Office-Supreme Court, U.S.
FILED
MAY 23 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1965~~ 163

J. KENNETH EDLIN, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

EDWARD L. GENN
Colorado Building
Washington, D. C. 20005

Counsel for Petitioner

May 23, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	11
1. The decision below raises an important and novel question as to the scope and application of the Speech or Debate Clause of the Constitution	11
2. The decision below, affirming the conviction of an aider and abettor while vacating the conviction of the principal and remanding for a new trial, conflicts with principles followed by this Court	16
3. The totality of prejudicial evidence introduced at petitioner's trial warrants the invocation of this Court's supervisory power over the administration of criminal justice in the federal courts	20
Conclusion	23
Appendix (opinion and judgment of Court of Appeals)	1a

CITATIONS

CASES:

Abrams v. United States, 327 F. 2d 898 (App. D.C.)	22
Anderson v. United States, 318 U.S. 350	14
Colosacco v. United States, 196 F. 2d 165 (C.A. 10)	18
Gebardi v. United States, 287 U.S. 112	14
Gober v. City of Birmingham, 373 U.S. 374	19
McDonald v. United States, 335 U.S. 451	14
Meredith v. United States, 238 F. 2d 535 (C.A. 4)	19
Michelson v. United States, 335 U.S. 469	21

Page

Morgan v. United States, 159 F. 2d 85 (C.A. 10) ... 18
Morrison v. California, 291 U.S. 82 14
Pierce v. United States, 86 F. 2d 949 (C.A. 6) 22
Shuttlesworth v. Birmingham, 373 U.S. 262 19
United States v. Johnson, 383 U.S. 169 .....2, 4, 5, 11, 12, 13, 14
United States v. Johnson, 215 F. Supp. 300 (D. Md.) 19
United States v. Lovely, 169 F. 2d 386 (C.A. 4) 22
United States v. Titus, 210 F. 2d 210 (C.A. 2) 19
United States v. Tomaiolo, 249 F. 2d 683 (C.A. 2) .. 22
Wason, Ex parte, L.R.4Q.B. 573 (1869) 15, 16

CONSTITUTION AND STATUTES:

Article I, Section 6, U.S. Constitution 3, 11, 16

18 U.S.C. § 281 .....3, 17, 18

18 U.S.C. § 371 4

MISCELLANEOUS:

Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L.J. 335 (1965) 16

Thomas, Freedom of Debate: Protector of the People or Haven for the Criminal?

3 The Harvard Review 74 (No. 3, Fall-Winter 1965) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

J. KENNETH EDLIN, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner herein, J. Kenneth Edlin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 16, 1964, affirming petitioner's conviction for conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and for aiding and abetting a violation of the "conflict-of-interest" statute, 18 U.S.C. § 281.

OPINIONS BELOW

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 337 F. 2d 180. The

opinion of the District Court for the District of Maryland is reported at 215 F. Supp. 300.

JURISDICTION

The judgment of the Court of Appeals (Appendix hereto, p. 43a, *infra*) was entered on September 16, 1964. A timely petition for rehearing and/or rehearing en banc was filed by the petitioner, but the Court of Appeals withheld action thereon pending the resolution of the related certiorari proceeding in this Court in *United States* v. *Johnson,* 383 U.S. 169, decided on February 24, 1966. Thereafter, on March 24, 1966, the Court of Appeals summarily denied the petition for rehearing and/or rehearing en banc. On timely application, the Chief Justice of the United States on April 18, 1966, ordered that the time for filing this petition for writ of certiorari be extended to and including May 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the United States Constitution, Art. I, § 6, bars the prosecution of a non-Congressman for conspiring with a Congressman to have the latter make a speech for compensation on the floor of the House of Representatives.*

---

* In the event that certiorari is granted as to this question, an additional question is presented and is preserved herewith for purposes of argument: Whether, if Art. I, § 6, does bar such a prosecution, the receipt of evidence concerning the speech was so prejudicial as to destroy petitioner's right to the unbiased consideration of the jury on the remaining counts of the indictment, thereby necessitating a new trial thereon as was ordered with respect to the Congressman.

2. Whether a conviction for aiding and abetting a Congressman in the receipt of compensation in violation of 18 U.S.C. § 281 can be sustained where the conviction of the Congressman as a principal under § 281 has been vacated and a new trial ordered.

3. Whether, in a federal criminal conspiracy trial, the repeated receipt of evidence concerning (a) the past and unrelated criminal record of the defendant, (b) the past and current investigations and complaints against the defendant with respect to unrelated matters, and (c) the adverse views and comments of Department of Justice officials with respect to the defendant, was in totality so prejudicial as to deprive the defendant of a fair trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, of the United States Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. § 281, which was repealed subsequent to the commission of the acts involved in this case, provided in pertinent part:

> Whoever, being a Member of or Delegate to Congress or a Resident Commissioner, either be-

fore or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SATEMENT OF THE CASE

In *United States* v. *Johnson*, 383 U.S. 169, this Court reviewed certain portions of the judgment below and affirmed the ruling that the Speech or Debate Clause of the Constitution, Art. I, § 6, bars the prosecution of ex-Congressman Johnson for allegedly conspiring to deliver for compensation a speech on the floor of the House of Representatives. This petition presents for review certain other portions of that same judgment, portions which affirmed the conviction of petitioner J. Kenneth Edlin on both the conspiracy and the aiding and abetting counts of the indictment.

Because the general nature and scope of this prosecution have been so recently under scrutiny by this Court, a detailed statement as to its thrust is unnecessary. Suffice it to say that the petitioner Edlin was charged, tried and convicted as (1) a co-conspirator with Congressman Johnson, under the conspiracy count, in the alleged scheme to have Johnson deliver for compensation a speech in the House of Representatives concerning the Maryland independent savings and loan business,[1] and (2) an aider and abettor of Johnson, under the seven substantive counts of the indictment, in the receipt of compensation in violation of 18 U.S.C. § 281, the federal conflicts of interest statute.

In the course of the prosecution and conviction of the petitioner under the conspiracy count, precisely the same evidence was introduced and considered by the jury as was introduced and considered with respect to Congressman Johnson. The speech itself was introduced. And, as summarized in this Court's *Johnson* opinion, 383 U.S. at 173-176:

> "Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company. The government attorney asked Johnson specifically about certain sentences in the speech, the reasons for their inclusion and his personal knowledge of the factual material supporting those statements. In closing argument

---

[1] Another facet of the alleged conspiracy concerned a scheme whereby two Congressmen—Johnson and Boykin—were to exert influence on the Department of Justice to obtain the dismissal of pending mail fraud indictments of First Colony Savings and Loan Association, its officers and the petitioner Edlin.

> the theory of the prosecution was very clearly dependent upon the wording of the speech. In addition to questioning the manner of preparation and the precise ingredients of the speech, the Government inquired into the motives for giving it."

No attempt was made to limit or confine the use of such testimony. It was used to secure the conviction of the petitioner Edlin as well as of Congressman Johnson and the other defendants under the conspiracy count. And the jury was in no way instructed to confine its consideration of such evidence as to the speech in evaluating the conspiracy guilt of any or all of the defendants; certainly no instruction was given by the judge that the jury should not consider the evidence regarding the speech in determining petitioner Edlin's guilt under the conspiracy count.

Indeed, the Government at no time has sought to distinguish between the various alleged co-conspirators in terms of the admissibility or use of the evidence concerning Johnson's speech in the House of Representatives. Nor has any argument ever been advanced by the Government that the constitutional problem stemming from the use of such evidence—the problem of the applicability of Article I, Section 6, of the Constitution—is any different as among the different co-conspirators. The first and only appearance of the idea that this evidence as to the speech was inadmissible with respect to Johnson alone, and that the constitutional provision pertained solely to the prosecution of Johnson, came in the *sua sponte,* unexpected and summary ruling of the Court of Appeals (see p. 18a, *infra*) that "as none of the privileges of Article I, section 6 pertain to the defendants who are not mem-

bers of Congress, their attack on the first count, unlike Johnson's, is not sustained."[2]

The Court of Appeals further held (see p. 42a, *infra*) that this "mass of evidence and comment" about the speech, "all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts." The judgment against Johnson was accordingly vacated and remanded for a new trial on the seven substantive counts involving receipt of payments in violation of 18 U.S.C. § 281. And this Court found under the circumstances "no occasion to review the Court of Appeals' assessment of the record in this respect." 383 U.S. at 186. But under its ruling that Article I, Section 6, in no way pertains to a non-Congressman like petitioner Edlin, the Court of Appeals made no assessment as to whether the introduction of the evidence regarding the speech infected the jury's consideration of Edlin's guilt under the conflicts of interest counts. Nor did the court below consider whether, in light of its vacating of Johnson's conviction as a principal in the conflicts of interest violations, the conviction of petitioner Edlin as an aider and abettor of those violations could stand.[3]

---

[2] The unexpected nature of this ruling, which had not been advanced by the Government or argued by any of the parties, prompted petitioner to file his rehearing petition in the court below. Action on that petition was withheld pending the decision of this Court in the *Johnson* case; the petition was thereupon summarily denied.

[3] The failure of the Court of Appeals to deal with the impact on an aider and abettor of a vacation of the conviction of the principal and a remand for a lew trial was one of the questions raised by petitioner in seeking rehearing below. The Court of Appeals without comment rejected the rehearing request.

Moreover, the Court of Appeals ruled (see pp. 40a-41a, infra), without elaboration and without reference to any specific incidents, that a "full" and "close" examination of the record failed to reveal the claimed "totality of prejudice" in the introduction of evidence against the petitioner Edlin. It thereby necessarily ruled that the combined impact of the following evidentiary incidents did not deprive the petitioner of a fair trial:

(1) One Charles Meyer, a Government witness and a federal parole officer, testified repeatedly over objections concerning (a) petitioner Edlin's unrelated and prior convictions and sentences (some of which occurred more than 20 years earlier), (b) Edlin's questioned activities in the unrelated Koruna Savings and Loan Association reorganization in 1950, and (c) the complaints of federal and state officials alleging "extreme indiscretion" by Edlin in the handling of his business affairs. Tr. 1827, 1860-1862, 1876-1883. In response to petitioner's objections to this testimony, the trial judge repeatedly ruled that evidence of such prior offenses or parole activities, however seemingly prejudicial, was admissible because of its relevancy to the alleged overt acts of the conspiracy.

(2) The then Attorney General, Robert F. Kennedy, testified for the Government and over petitioner's objections that (a) there was considerable derogatory information about petitioner Edlin in the Department of Justice files, (b) the then pending mail fraud indictment against Edlin was, in the Department's view, "a strong case," "well brought" and "should go forward," (c) Edlin's testimony before a grand jury investigating an unrelated matter involving James R. Hoffa was thought by the Department not to be "com-

pletely truthful," and (d) to answer questions about an unrelated allegation that Edlin had purchased a stolen Treasury bond would be getting "into a real can of worms." Tr. 1669-1690. The trial judge's response to petitioner's repeated motions for mistrial was to reaffirm the ruling that evidence of this type was relevant to the alleged overt acts of the conspiracy.

(3) Herbert J. Miller, Jr., then an Assistant Attorney General, testified for the Government that (a) Edlin had had difficulties with the postal inspection authorities on "more than one occasion," (b) Edlin had "also been convicted in the thirties" and had been associated with a midwest savings and loan association that had been placed in receivership, (c) Edlin was not the "type of individual" deserving of sympathetic treatment by the Department, (d) Edlin had been convicted on two or three prior occasions, and (e) the Department had a "good case" against Edlin on the mail fraud charges. Tr. 2035-2252. Once again, petitioner's motions for mistrial were denied on the theory that this kind of evidence might somehow be relevant to the alleged conspiracy.

(4) Prejudicial testimony concerning the petitioner was also given by numerous other Government witnesses, including such remarks as (a) the fact that Edlin was, at the time of the instant trial, under indictment in Montgomery County, Md., on a quite different charge, (b) the allegation that Edlin had purchased a stolen Treasury bond, (c) the fact that the First Colony Savings and Loan Association, allegedly controlled by Edlin, had been placed in receivership *after* the period of the alleged conspiracy, and (d) the claim that moneys paid to Johnson for his services came not from Edlin but from the savings and loan association.

Petitioner's objections to such testimony were overruled and mistrial motions were denied.

The reiterated objections by petitioner to evidence of this prejudicial nature were all premised on his contention that his character rather than his actions had thereby been put on trial. All such objections were summarily overruled. And the overrulings were unaccompanied by any effective cautionary instructions to the jury. When the Court of Appeals stated (p. 40a, *infra*) that "whenever the situation called for a specific instruction to the jury, appropriate instruction was given," it could only have been referring to certain instructions concerning hearsay statements. As to the *prejudicial* statements noted above, there was no effective instruction to the jury.

Finally, the Court of Appeals ruled (p. 39a-40a, *infra*) that the following statement in the Government's closing summary to the jury did not constitute an improper comment on petitioner Edlin's failure to take the stand:

> "Members of the Jury, the defendant Edlin has presented no defense in this case. He has presented no evidence to contradict the charges against him. He has produced no evidence to deny numerous statements made by many, many government witnesses. He has produced no evidence to deny the testimony of numerous witnesses of his various activities which clearly indicate beyond any doubt, Members of the Jury, his guilt of the charges in this indictment."

As a consequence of the Court of Appeals action, petitioner Edlin stands convicted on all eight counts—the conspiracy count and the seven aiding and abetting counts. That conviction has resulted in a sentence of

imprisonment for one year "as to each of Counts 1 to 8 inclusive, said terms of imprisonment to run concurrently." Tr. 104. In addition, he has been sentenced to "pay a fine of Two Thousand Dollars ($2,000.00) as to each of Counts Nos. 1 to 8, inclusive, said fines to be cumulative making a total fine of Sixteen Thousand Dollars ($16,000.00)." Tr. 104.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important and Novel Question as to the Scope and Application of the Speech or Debate Clause of the Constitution.

In dealing with the instant prosecution for conspiracy, this Court in *United States* v. *Johnson,* 383 U.S. 169, has recognized that the Speech or Debate Clause of the Constitution, Art. I, § 6, at least when considered as to ex-Congressman Johnson, proscribes the evidence that was introduced concerning his speech in the House of Representatives and its motivations. The critical holding was expressed in these terms (383 U.S. at 184-185): "We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech and its motivations] necessarily contravenes the Speech or Debate Clause."

In that respect, the ruling of the court below was consistent with the conclusion reached by this Court. But the lower court's further ruling—which was not before this Court for review in *Johnson*[4]—that "none

[4] Petitioner filed an *amicus* brief in this Court in the *Johnson* case pointing out that his contention that the principles of the Speech or Debate Clause necessarily applied to him as an alleged co-conspirator of the ex-Congressman was still pending before the Court of Appeals on the rehearing petition. This Court, in recognition of that fact, noted that questions raised by the co-defendants Edlin and Robinson "have not been presented to us." 383 U.S. at 172-173, n. 3.

of the privileges of Article I, section 6 pertain to the defendants who are not members of Congress" (p. 18a, *infra*) raises a most significant constitutional question worthy of this Court's consideration.

That question, of course, relates to the scope and reach of the Speech or Debate Clause in the setting of a conspiracy charge involving both a Congressman and non-Congressmen where an illicit inquiry has been made into the Congressman's speech and its motivations. Does that Clause bar the entire conspiracy prosecution, even as to the co-conspirators who are not Congressmen? Or can the Clause be applied only as to the Congressman as co-conspirator, leaving the Government free to inquire into the speech and its motivations in order to convict the other co-conspirators?

An answer to this question is essential in order to remove the doubts now existing as to the scope of the Clause and the extent to which Congress and the courts may deal with alleged conspiracies of this nature. The *Johnson* decision has established the bounds of one important dimension of that Clause; this case presents another dimension, the precise measurement of which is as significant as the *Johnson* measurement. As the Solicitor General's petition for certiorari in the *Johnson* case pointed out (p. 7), the problem there was important because it "affects public confidence in Congressional debate—certainly a matter of great national significance." And the Solicitor General asked (p. 7) that the matter be resolved "so that Congress may establish such machinery as is appropriate to deal with matters of this kind." It is no less important, from the standpoints of public confidence in Congressional debate and the need for establishing appropriate

machinery, that a definitive resolution be made of the extent to which an inquiry into a Congressional speech and its motivations may be made in order to convict a Congressman's alleged co-conspirators. Since there are far more potential non-Congressional defendants than Congressional defendants who might be the subjects of conspiracy indictments of this nature, it becomes that much more appropriate to have this Court's answer to the problem.

The substantiality of the constitutional problem here presented may quickly be gleaned from the following considerations:

(1) The Speech or Debate Clause itself provides that a Senator or Representative "shall not be questioned in any other Place" without specification as to the circumstances under which that questioning takes place. In short, the language of the Clause affords no basis for assuming that such a questioning can occur in order to secure a conviction of non-Congressional conspirators. It prohibits broadly and without limitation any questioning of a Congressman and any inquiry into a Congressional speech or its motivations.

(2) The opinion of this Court in *Johnson,* as well as the opinion of the court below, speaks of the Speech or Debate Clause as one that proscribes the intensive judicial inquiry into the speech and the resulting evidence taken in the course of this prosecution under a general conspiracy statute. The conclusion "that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause," 383 U.S. at 184-185, admits of no distinction in the application of the Clause as between the various defendants whose convictions rested upon

that inquiry and that evidence. In these circumstances, the impact of the Clause falls on the conspiracy prosecution as such—not upon a particular defendant.

(3) Moreover, as this Court noted (383 U.S. at 177), the conspiracy theory in this case was dependent "upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith." But that theory was as essential to the conspiracy conviction of the petitioner as it was to the conspiracy conviction of Johnson. And if the theory as to Johnson was constitutionally impermissible, it would not be any more permissible because the co-defendant happened to be a non-Congressman.[5]

(4) The prime purpose of the Clause is to preserve legislative freedom and to prevent intimidation by the executive and accountability before a possibly hostile judiciary. See 383 U.S. at 181. But that purpose is ill-served if the legislator is subject to judicial inquiry as a necessary part of a conspiracy prosecution against non-legislators. A Congressman may be as much if not more inhibited by the fear of judicial inquiry into his speeches and motivations where the criminal conspiracy prosecution is directed not at him but at his aides, his constituents, his friends, or others with whom

---

[5] If the conviction of one of two defendants charged with conspiracy fails for insufficiency of supporting evidence, the conviction of the other co-conspirator must also fail. See *Gebardi* v. *United States*, 287 U.S. 112, 123; *Morrison* v. *California*, 291 U.S. 82, 93. That principle would seem particularly relevant where the conviction of one defendant fails because the necessary supporting evidence is constitutionally proscribed. Cf. *McDonald* v. *United States*, 335 U.S. 451, 456; *Anderson* v. *United States*, 318 U.S. 350, 356-357.

he has had dealings. The evil of inhibition, in short, arises from the fact or threat of inquiry, not from the naming of a particular defendant whose guilt depends upon the making of such an inquiry. Thus if the prosecution necessarily is premised upon conducting an inquiry of this nature, the policy as well as the language of the Speech or Debate Clause forecloses the prosecution, whoever may be the named defendants. So to conclude, of course, is not to free the non-legislative defendants of amenability to law; they remain as always subject to laws and prosecutions for violations thereof (such as for bribery) which are not dependent upon the proscribed type of inquiry.

(5) Thus the ultimate answer to the question here posed may well be that given by the English tribunal in *Ex parte Wason*, L.R. 4 Q.B. 573 (1869), referred to by this Court, 383 U.S. at 183. There two members of the House of Lords and one non-member were charged with conspiracy to have untrue and damaging statements made in the House. The Queen's Bench ruled that such a charge was not "an indictable offense"—even as to the non-member—because of the illicit inquiry necessarily contemplated by the charge.

(6) Indeed, in his reply brief before this Court in the *Johnson* case (p. 3), the Solicitor General recognized that the foregoing considerations—which had been mentioned in petitioner's *amicus* brief before this Court—constituted the "logical conclusion" of any analysis which applied the Clause "whenever the motivation for making a speech is called into question." In effect, this Court had adopted just that analysis of the Clause, carefully limiting it to prosecutions under a general conspiracy statute that are dependent upon the

improper inquiry. And at least in this particular prosecution—where the theory of the conspiracy charge was the same as to all defendants and where precisely the same inquiry and the same evidence as to the speech and its motivations were essential to the convictions of all—the "logical conclusion" must be that the conspiracy charge as to petitioner Edlin was constitutionally impermissible.[6]

These, then, are the main considerations underlying the constitutional question here posed. The intrinsic importance of that question and the necessary implications of the *Johnson* decision warrant the grant of certiorari.

2. The Decision Below, Affirming the Conviction of an Aider and Abettor While Vacating the Conviction of the Principal and Remanding for a New Trial, Conflicts With Principles Followed by This Court.

The court below has created a legal anomaly in the disposition of petitioner's case, an anomaly so contrary to legal principles established by this Court and so contrary to the concepts of fair criminal justice as to call for corrective action by this Court.

As a result of the disposition of the various co-defendants' appeals by the court below, a disposition largely unaffected by this Court's judgment in the

---

[6] To date, apart from the ruling below and the Queen's Bench decision in *Ex parte Wason*, both judges and commentators have been silent concerning the scope of the Speech or Debate Clause concept beyond its obvious applicability to the legislative defendant. See, e.g., Thomas, *Freedom of Debate: Protector of the People or Haven for the Criminal?* 3 The Harvard Review 74 (No. 3, Fall-Winter 1965); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L. J. 335 (1965).

Johnson case,[7] the following situation now exists with respect to the conflicts-of-interest violations under 18 U.S.C. § 281:

(1) The conviction of Congressman Johnson as the alleged principal or recipient of payments in violation of § 281 has been vacated and the matter remanded for a new trial. This action was premised on the Court of Appeals' belief (see p. 42a, *infra*) that the mass of evidence and comment concerning the Johnson speech, all inadmissible against Johnson and proscribed by the Speech or Debate Clause, "infected the jury's consideration of his innocence or guilt under the conflicts of interest counts."[8]

(2) At the same time, however, petitioner Edlin's conviction as an aider or abettor of Johnson's § 281 violations, as principal, has been affirmed. In other words, approval has been given to petitioner's conviction for aiding and abetting violations of law supposedly committed by one whose guilt has yet to be determined pursuant to a new trial.

It is elementary, however, that an aiding and abetting violation must be premised upon a determination

[7] This Court stated, 383 U.S. at 185, that the Court of Appeals' opinion could be read as dismissing the conspiracy count in its entirety as to Johnson. But the Court ruled that since the making of the speech was only a part of the conspiracy charge, the Government should not be precluded from a new trial on that count after purging therefrom all elements offensive to the Speech or Debate Clause. But in all other respects, the judgment below as to Johnson was left undisturbed by this Court.

[8] As indicated in the note to the first question presented in this petition, petitioner reserves the right to urge that, if the Speech or Debate Clause be deemed to outlaw the conspiracy charge as to him, the jury's consideration of the § 281 aiding and abetting charges against petitioner was likewise "infected."

that the principal offense has in fact been committed.[9] The fact must be established "beyond a reasonable doubt that the offense was committed by someone." *Colosacco* v. *United States,* 196 F. 2d 165, 167 (C.A. 10). Thus in the context of this case, it would be essential to establish by jury verdict that Johnson, as principal, did in fact "unlawfully, wilfully, knowingly and corruptly" receive compensation before the petitioner could stand convicted of the charge of "aiding, abetting, counselling, commanding, inducing and procuring the defendant Thomas F. Johnson" in the unlawful receipt of that compensation.[10]

But that essential predicate of an aiding and abetting conviction has been removed by the Court of Appeals' judgment. The jury's verdict as to whether an offense under § 281 actually occurred has been found to have been improperly influenced by the constitutionally proscribed evidence respecting the speech. That verdict has accordingly been set aside and a new trial has been ordered. Johnson must now be presumed innocent, a presumption that will remain in effect until a new jury finds that he did in fact violate § 281. But that new jury could find him innocent of the § 281 charges. In that event, it would be conclusively established that no offenses under § 281 occurred, Johnson being the only conceivable person capable of committing such offenses. How, then, can an aiding and abetting conviction now be affirmed when the principal offense has not been and may never be established?

---

[9] "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense." *Morgan* v. *United States,* 159 F. 2d 85, 87 (C.A. 10).

[10] This aiding and abetting language appears in all seven of the § 281 counts against the petitioner.

This Court's action in *Shuttlesworth* v. *Birmingham,* 373 U.S. 262, 265, provides the only possible answer to that question. There the Court had found in a companion case, *Gober* v. *City of Birmingham,* 373 U.S. 374, that the conviction of certain persons for criminal trespass on private property was improper by virtue of the Equal Protection Clause of the Fourteenth Amendment. The petitioners in the *Shuttlesworth* case had been convicted for inciting, aiding and abetting those charged with trespass in the *Gober* case. This Court concluded, 373 U.S. at 265, that "Since the convictions in *Gober* have been set aside, it follows that the present petitioners did not incite or aid or abet any crime, and that therefore their own convictions must be set aside." The failure of the court below to apply that conclusion so as to set aside petitioner's conviction as an aider and abettor must be deemed to conflict with the *Shuttlesworth* decision.

In sum, the voiding of Johnson's conviction as principal makes it legally impossible to sustain an aiding and abetting conviction at this time. See *United States* v. *Titus,* 210 F. 2d 210, 215 (C.A. 2).[11] That indeed was the pre-trial ruling in this instant case, *United States* v. *Johnson,* 215 F. Supp. 300, 214, fn. 15 (D.C. Md.): "A charge against an alleged aider and abettor must fall if no sufficient charge is made against the principal."

In the exercise of its supervisory power over the administration of criminal justice in the federal courts,

---

[11] In the *Titus* case, the Second Circuit ruled that if the person charged as principal in the alleged misapplication of bank funds be found not guilty then the individual charged as an aider and abettor was equally not guilty. See also *Meredith* v. *United States,* 238 F. 2d 535, 542 (C.A. 4).

this Court should order the vacating of the aiding and abetting conviction of the petitioner. Simple justice, as well as the principles recognized and applied in the *Shuttlesworth* case, requires that a definitive and untainted resolution of the principal's guilt precede or accompany any final determination of the guilt of an alleged aider or abettor.

3. The Totality of Prejudicial Evidence Introduced at Petitioner's Trial Warrants the Invocation of This Court's Supervisory Power Over the Administration of Criminal Justice in the Federal Courts.

There have been many claims that the introduction of prejudicial testimony has resulted in an unfair trial. Such claims are rarely sustained. But the claim that is made here is not of the routine variety; nor is it lightly advanced. It arises out of a trial atmosphere most conducive to the germination and growth of prejudicial evidence—a long, complicated, highly publicized conspiracy trial. And it is not unfair to say, on the basis of the entire record before this Court, that seldom if ever has a federal conspiracy trial involved so extensive an accumulation of prejudicial testimony against one defendant.

This petitioner, who did not take the stand, was in reality tried not on the charges against him but on the allegations of witnesses respecting his past criminal record, his past reputation and his past conduct. Over and over again these witnesses—including the Attorney General of the United States—were allowed to besmirch the character of this petitioner. They repeatedly testified as to his long-past prior convictions and his alleged parole "indiscretions." They said that, in the opinion of the Department of Justice, he had not been "completely truthful" in an unrelated Hoffa grand jury in-

quiry and that he was not the "type of individual" deserving of sympathetic treatment by the Department. They mentioned that he was, at the time of this trial, under indictment in Montgomery County, Md., on an entirely separate matter. Many of the statements were admittedly untrue in whole or in part, or consisted of mere rumor.

Yet all of these items were placed before the jury on the basis of their asserted relevance and probative relationship to the conspiracy charges. And in his summation to the jury, the prosecutor was able to capitalize on this testimony, pointing out that the petitioner "has presented no defense" and "has produced no evidence to deny the testimony of numerous witnesses of his various activities which clearly indicate . . . his guilt of the charges in this indictment."

But this Court's decision in *Michelson* v. *United States,* 335 U.S. 469, 475-476, conclusively demonstrates that, however probative such prejudicial evidence may be thought to be, the law

> "... simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its

> disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

In fact, any one of the many prejudicial statements would be sufficient to warrant a mistrial or a reversal of a conviction, particularly those dealing with past and unrelated criminal prosecutions. See *United States* v. *Lovely,* 169 F. 2d 386 (C.A. 4); *United States* v. *Tomaiolo,* 249 F. 2d 683 (C.A. 2); *Abrams* v. *United States,* 327 F. 2d 898 (App. D.C.). Not even a prompt admonition to the jury to disregard such statements, had one been given in this case, would serve to undo the prejudicial impact. *Pierce* v. *United States,* 56 F. 2d 949, 952-953 (C.A. 5). But when all of the prejudicial statements uttered in this trial and all the repetitions thereof are combined together, there can be no conclusion other than that the spirit and the rule of the *Michelson* decision have been violated.

As so often is true with respect to purely prejudicial testimony, the evidence of that nature in this case has not been claimed to be necessary to the establishment of any aspect of the Government's case. The only conceivable purpose of introducing it was to suggest to the jury that it could infer guilt at this trial from past convictions, past character and an unrelated pending indictment. That is precisely what made this trial unfair.

So egregious was the unfairness marking petitioner's trial as to require review and action by this Court. The court below failed to assess the record in the light of the prejudicial impact of particular items or to document its generalized conclusion that "in the totality of the trial we perceive no unfairness." See p. 41a, *infra.* The judgment below thus lacks the weight it

might otherwise have in assuring this Court that there has been no maladministration of federal criminal justice. The lower court's imprecise and vague treatment of this most serious problem serves to augment the need for the full exercise of this Court's supervisory powers.

CONCLUSION

For the various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

EDWARD L. GENN
Colorado Building
Washington, D. C. 20005
Counsel for Petitioner

May 23, 1966

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9223

UNITED STATES OF AMERICA, *Appellee*,

v.

THOMAS F. JOHNSON, J. KENNETH EDLIN, and WILLIAM L. ROBINSON, *Appellants*.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

(Argued April 16, 1964. Decided September 16, 1964.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BUTZNER, District Judge.

George Cochran Doub (Weinberg & Green on brief) for Appellant Thomas F. Johnson; William L. Robinson, Pro Se; and Eugene Gressman and Edward L. Genn (Brown, Genn, and Brown on brief) for Appellant J. Kenneth Edlin, and J. Hardin Marion, III, Special Assistant United States Attorney, and Arthur L. Burnett, Attorney, Department of Justice, (Robert W. Kernan, First Assistant United States Attorney, and David Ellenhorn, Attorney, Department of Justice, on brief) for Appellee.

SOBELOFF, Chief Judge:

Two members of the United States Congress and two other persons were jointly indicted for violations of both the conspiracy statute, 18 U.S.C.A. § 371, and the conflicts of interest statute, 18 U.S.C.A. § 281.[1] After a jury trial the four defendants were convicted. One, Frank W. Boykin, a Representative from Alabama, paid his fine and has not appealed. This is the appeal of Representative Thomas F. Johnson of Maryland, and J. Kenneth Edlin and William L. Robinson.

The indictment was in eight counts. The first charged a conspiracy "to defraud the United States * * * (a) Of * * * its right to have * * * the official business of the Department of Justice, conducted honestly * * *. (b) Of * * * its right to have * * * personnel of the Department of Justice, free * * * of * * * unlawful, improper and undue pressure * * *. (c) Of * * * its right to have the lawful functions and duties of the defendants THOMAS F. JOHNSON and FRANK W. BOYKIN * * * free from corruption * * *. (d) Of * * * its right not to be deprived of the faithful, loyal and conscientious services of the defendants THOMAS F. JOHNSON and FRANK W. BOYKIN * * *."[2] This count alleged that as part of the conspiracy Johnson was paid to make a speech in Congress and to persuade officials of the Department of Justice to cause the postponement and eventual dismissal of a criminal action then pending against Edlin.

The remaining seven counts charged Johnson with the substantive offenses of receiving payment for representing Edlin before the Justice Department. 18 U.S.C.A. § 281. In these counts Robinson and Edlin were charged as aiders and abettors.

---

[1] See pre-trial opinion of District Court, *United States* v. *Johnson*, 215 F. Supp. 300 (D. Md. 1963).

[2] Paragraph 14, subparagraphs (a) to (d) of the indictment.

I. THE INDICTMENT

A. First Count—Conspiracy

The appellants attack the validity of count one on two broad fronts. First, they say that in general conspiracy indictments should not be tolerated because of the abuses which they engender. Second, they contend that this particular indictment is defective in a number of ways.

1. *Alleged Invalidity of Conspiracy Indictments*

The appellants' criticism of conspiracy indictments is not wholly without foundation. They are not the first to express the view. Similar statements can be found in concurring and dissenting opinions in the Supreme Court and in a number of Law Review articles. *Krulewitch* v. *United States,* 336 U.S. 440, 445-48 (1949); *Kotteakos* v. *United States,* 328 U.S. 750, 760-74 (1946). Goldstein, "Conspiracy to Defraud the United States," 68 Yale L.J. 405 (1958). The dragnet effect of conspiracy indictments, their sometime indiscriminate use and the unfair advantage they may give to the prosecution in respect to evidence and proof are well known. While this is true, the Supreme Court has not said that conspiracy indictments as such are improper; convictions based upon them have been repeatedly upheld. The net effect of the Court's expressions of concern is an admonition to scrutinize carefully the allegations of such indictments and the proof adduced in their support.

2. *Specific Attacks on First Count*

a. *Vagueness and indefiniteness*

The appellants insist that count one is indefinite and vague and fails to inform them of the charge alleged. Our reading of the count does not confirm this contention. The count alleges a conspiracy "to defraud the United States." Subparagraphs (a) to (d) of paragraph 14, summarized above, enumerate four governmental functions and rights which are alleged to have been defrauded. It was not nec-

essary to allege that the Government had been defrauded of money or property. Section 371 has consistently been interpreted to support an indictment charging that a lawful function of the Government has been interfered with or obstructed. *Hammerschmidt* v. *United States,* 265 U.S. 182 (1924); *Curley* v. *United States,* 130 Fed. 1 (1st Cir.), *cert. denied,* 195 U.S. 628 (1904); *Haas* v. *Henkel,* 216 U.S. 462 (1910).

Paragraphs 15 to 25 of count one state the objects and purposes of the conspiracy. Thereafter 75 overt acts are alleged. Contrary to the appellants' contentions, the indictment did not give the Government carte blanche to introduce evidence and frame any imaginable purpose of the conspiracy. In plain and concise language the paragraphs 15 to 25 effectively define the objects and delineate the proof. This is all that Rule 7(c)[3] of the Rules of Criminal Procedure requires. See *May* v. *United States,* 175 F.2d 994 (D.C. Cir.), *cert. denied,* 333 U.S. 830 (1949); *United States* v. *Manton,* 107 F.2d 834 (2d Cir. 1938), *cert. denied,* 309 U.S. 664 (1940).

b. *Duplicity*

Because count one alleges both Johnson's speech *and* his discussions with members of the Justice Department, the appellants maintain that it is duplicitous. The short and, we think, sufficient answer is that the indictment charges only one conspiracy—to defraud the United States—and this is not changed by the assertion of more than one means used to accomplish the object. "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States,* 249 U.S. 204, 210 (1919).[4]

---

[3] "7(c) The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

[4] See also *United States* v. *Manton, supra,* and *May* v. *United States, supra,* where the same contension was raised and rejected.

c. *Alleged insufficiency of allegations charging fraud*

We must also reject the argument that count one was fatally defective because it failed to charge any false statement, misrepresentation or deceit. In *Hammerschmidt* v. *United States,* 265 U.S. 182, 188 (1924), the Supreme Court defined the word "defraud" as used in what is now section 371:

> "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, *or at least by means that are dishonest.*" (Emphasis added).

Since *Hammerschmidt,* numerous cases have held that the payment of money by a private person to an official of the Government for the performance of an official act constitutes a fraud. *United States* v. *Manton, supra; Glasser* v. *United States,* 315 U.S. 60 (1942); *May* v. *United States, supra; United States* v. *Bowles,* 183 F. Supp. 237 (S.D. Me. 1958). *Glasser* really closed the debate. There the Court, citing *Hammerschmidt,* said:

> "The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a 'defrauding' within the meaning of [section 371] of the Criminal Code." 315 U.S. at 66.

The indictment in paragraphs 15 to 25 explicitly stated that it was a part of the conspiracy for appellant Johnson to receive compensation from appellants Edlin and Robinson. Manifestly this is a "dishonest means," in the *Hammerschmidt* phrase, and is sufficient to support an indictment under section 371.

d. *The alleged impossibility of defrauding the Justice Department*

Appellant Edlin contends that the conspiracy count must fail because it was impossible to defraud the United States in connection with the criminal charge pending against him. His position is that it was not within the power of the Department of Justice to effectuate a postponement of the trial or a dismissal of the indictment, because that power was solely in the court. The argument is specious: It is true that the court's consent would be required to dismiss a pending charge, Rule 48(a), Fed. R. Crim. P., but in a practical sense, as the Department is in charge of the prosecution, its decision to postpone a trial, or even to abandon a case, has great, if not decisive, influence with the court.

e. *Congressional privilege*

Appellant Johnson's principal contention is that insofar as the indictment questions his motivation in making a speech on the floor of the House, it contravenes Article I, section 6 of the Constitution.

> "The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" (Emphasis added).

This is the first case, within our knowledge, squarely raising the question whether the congressional privilege deprives a court of jurisdiction to try a member on a criminal charge of accepting money to make a speech in the House of which he is a member.

The history of the parliamentary privilege is a long and turbulent one, developed in the course of conflict between Parliament and the Crown as to the proper subjects of discussion on the floor of Parliament.[5] The Crown asserted that matters then under debate in Parliament were within the King's prerogative, while Parliament insisted that it was protected by the privilege. Particularly disconcerting to the Crown was Parliament's intrusion into matters affecting the succession and into questions of religion. During the reigns of both Queen Elizabeth and James I the Crown resisted Parliament's expansion of its independence. More than once, members of Parliament were committed to the Tower.[6]

The accession of Charles I brought continued conflict.[7] In 1629 three members of the House of Commons, Sir John Elliot, Denzill Holles and Benjamin Valentine, when arrested and prosecuted for libelous and seditious speeches, pleaded to the jurisdiction of the court. They maintained that they were punishable, if at all, only in Parliament. The King's Bench rejected their plea and convicted them, Judge Sir William Jones observing: "We are the judges of their lives and lands; therefore of their liberties." 3 HOWELL, STATE TRIALS, 296, 306. The decision was very unpopular and contributed to the eventual downfall of Charles.[8]

---

[5] See generally MAY, TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (16th ed. 1957); WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (Ohio State University 1921).

[6] TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME, 249 (11th ed. 1960).

[7] CHRIMES, ENGLISH CONSTITUTIONAL HISTORY, 151-53 (2d ed. 1953).

[8] WITTKE, *op. cit. supra*, n.5.

Immediately after the Revolution of 1688, Parliament enacted the Bill of Rights containing the following declaration: "[T]hat the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." Since then the privilege of speech and debate has never been questioned or denied.

The scope of the privilege is demonstrated in the English case, *Ex parte Wason,* 4 Q.B. 573 (1869). There the English court held that a conspiracy by a number of persons, including members of the House of Lords, to make false statements in the House was not an offense at law, because the courts were powerless to question the motives and intentions of members when speaking before the Parliament.

In the landmark case of *Stockdale* v. *Hansard,* 9 Adolphus & Ellis 1 (1839), Lord Denman described the privilege, by then fully developed, in these words:

> "The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So if the speaker by authority of the House order an illegal act, though that authority

> shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer."

Early in the history of the American colonies, the privilege of speech was recognized,[9] and many of them placed it in their constitutions when they achieved independence.[10] "The provision in the United States Constitution was a reflection of political principles already firmly established in the States." *Tenney* v. *Brandhove,* 341 U.S. 367, 373 (1951).

In an 1808 Massachusetts decision by the highest court of that state,[11] subsequently characterized by the Supreme Court of the United States as an authoritative description of the constitutional provision, Chief Justice Parsons wrote:

> "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the

---

[9] CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES, 71 (1943).

[10] See, *e.g.*, Maryland Declaration of Rights, Nov. 3, 1776 ("That freedom of speech, and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature."); Massachusetts Constitution of 1780, Art. VIII ("The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever."); New Hampshire Constitution of 1784, Part 1, Art. XXX ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.").

[11] *Coffin* v. *Coffin,* 4 Mass. 1 (1808).

> functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

What we derive from this historical review of the congressional privilege is a firm conviction that the constitutional provision is to be interpreted liberally and not narrowly. We also conclude that the general test to be applied where the privilege is asserted is that whenever the motivation for making a speech is called into question, the privilege applies. Two leading Supreme Court opinions confirm this view.

Kilbourn v. *Thompson*,[12] decided in 1880, held, among other things, that a congressman who initiates, supports and votes for a resolution calling for the arrest of another person cannot be questioned in court in a suit for malicious prosecution. In 1951, *Tenney* v. *Brandhove*[13] confirmed *Kilbourn's* holding that the courtroom is not the proper place to question the motives of legislators where they are

---

[12] 103 U.S. 168 (1880).

[13] 341 U.S. 367 (1951).

acting within their traditional sphere. Justice Frankfurter, speaking for the Court, said:

> "*The claim of an unworthy purpose does not destroy the privilege.* Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. at 377 (Emphasis added).

Equally broad is the textwriters' description of the privilege.[14] While none of them treats directly the question before us, the language of each is unequivocal in attributing to the constitutional provision wide and almost absolute scope.

---

[14] 1 BLACKSTONE, COMMENTARIES, 164 (Cooley, 4th ed. 1899); 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 929 (8th ed. 1927); CUSHING, LEGISLATIVE ASSEMBLIES, § 601 (2d ed. 1866) ("[I]n short, * * * the privilege in question secures the members of a legislative assembly against all prosecutions, whether civil or criminal, on account of any thing said or done by them, during the session, resulting from the nature and in the exercise of their office."); DELOME, THE CONSTITUTION OF ENGLAND, 66 (5th ed. 1885); 2 THE WORKS OF JAMES WILSON, 37-38 (1896); SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, 104 (1963); 1 STORY ON THE CONSTITUTION, § 866, p. 600 (3d ed. 1858) ("The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual."); 1 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES, § 233 (1910).

What we have said thus far is, we think, generally accepted. The question with which we are faced is whether these general principles become inapplicable when bribery is a motivating factor for making a speech in a legislative chamber. The Australian courts have considered the effect of the privilege where criminal prosecutions were brought against legislators for taking bribes to cast their votes and held that the privilege did not protect accused legislators. *Regina* v. *White,* 13 S.C.R. (N.S.W.) 332 (1875); *Rex* v. *Boston,* 33 C.L.R. 386 (1923). See also the Canadian case of *Regina* v. *Bunting,* 7 O.R. 524 (1885). These cases are not binding on us but we consider them, especially as they bear on the historic concept of the privilege.

While it is true that count one of the indictment alleges a "conspiracy to defraud the United States" and not bribery, the District Court, by citing federal and state statutes which make the acceptance of a bribe a criminal act, recognized the close relation between the two.[15] The District Judge also noted that in no instance has the constitutionality of either the federal or a state bribery statute ever been questioned. Reasoning by analogy from these statutes and the state cases decided under them—which do not, however, discuss the constitutional question—the Judge concluded that "the prosecution of a Member of Congress for receiving money from a private person for making a speech on the floor of the House would not be barred by Art. I, sec. 6, cl. 1 of the Constitution." 215 F. Supp. 300, 307 (D. Md. 1963).

Basic to the conclusion of both the District Judge and the Government is the reasoning that "[t]o hold Count One of the present indictment barred by the privilege would subvert rather than advance the purpose for which the privilege exists—*the independence of the legislator in the*

---

[15] *United States* v. *Johnson,* 215 F. Supp. 300, 306 n.6 (D. Md. 1963).

fulfillment of his public trust." 215 F. Supp. at 307. (Emphasis added). It would be less than candid to deny the appeal of this reasoning, for one readily perceives a difference between fearless speech and corrupt speech, but after deliberate consideration we must reject the District Court's conclusion.

Inevitably, the indictment required an inquiry into Johnson's reason for delivering the speech, the very inquiry which the Supreme Court has explicitly declared to be beyond a court's power. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). The contents of the speech as such were not challenged. In fact the indictment attacked only the purpose for which the speech was made, *i.e.*, "to defraud the United States." To prove this, however, the speech in its entirety was introduced into evidence and was commented upon extensively by the prosecution during the trial and in the closing arguments. Since Johnson could not deny making the speech it naturally became necessary for him to demonstrate that his purpose for delivering it was good. But the Supreme Court has declared in *Tenney* that "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S. at 377. The speech was more than an incidental feature of the conspiracy charged. Fully one-half of the testimony introduced at the trial related to the speech.

Federal cases discussing the privilege have repeatedly held that the good or bad faith of the member making the speech is immaterial. Indeed this is precisely the teaching of *Tenney*. In *Cockran* v. *Couzens*, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930), for example, the complaint alleged that a Senator "[m]aliciously, wilfully, falsely and wrongfully" delivered a "scandalous, malicious and defamatory slander" in a speech on the floor of the Senate. In affirming the District Court's dismissal of the complaint, the court held that "the words forming the basis of plaintiff's action were uttered in the course of a speech in the chamber of the Senate of the United States, and were

absolutely privileged and not subject to 'be questioned in any other place.'" 42 F.2d at 784 (Emphasis added). The court added:

> "It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleages. Article 1, § 5." 42 F.2d at 784.

See also *Barsky* v. *United States*, 167 F.2d 241 D.C. Cir. 1948).

Couzens, we note, was a civil action, but it would be inconsistent to conclude that a corrupt speech is less within the congressional privilege when labeled a crime. It may be argued with some reason that it is not indispensable to the "independence of a legislator" to shield him from court action when he uses his office to willfully and intentionally slander another in a speech; yet, as we have seen, he cannot be called to account in a court of law for such a willful abuse. The constitutional protection against being called upon to answer in "any other place" for a speech delivered in the House is equally impaired whether the court proceedings are criminal or civil. Indeed, fear of criminal prosecution may be the graver inhibition.

Coffin v. *Coffin*, which was quoted at length by the Supreme Court in both *Kilbourn* and *Tenney*, emphasized that the privilege belongs to the Congress and was developed for the benefit of Congress as a whole. This does not mean that a member of Congress is immune from sanction or punishment. Nor does it mean that a member may with

impunity violate the law; it means only that the Constitution has clothed the House of which he is a member with the sole authority to try him. In this respect the Constitution has made the Houses of Congress independent of other departments of the Government. These bodies, the Founders thought, could be trusted to deal fairly with an accused member and at the same time do so with proper regard for their own integrity and dignity.

The broad interpretation we give to the congressional privilege does not, we believe, contravene a caveat the Supreme Court placed at the conclusion of both the *Kilbourn* and *Tenney* opinions. In its entirety, the caveat pronounced in *Kilbourn* reads:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." 103 U.S. at 204-05.

From the illustrations hypothesized in the caveat, it is plain that the Court envisioned a situation so extreme that the Congress as awhole, because of its total involvement in the corruption, was incapable of taking appropriate disciplinary action against individual members. No such situation is before us, nor does this case even remotely approximate one.

All will agree that when a congressman accepts compensation for a speech, his act is reprehensible. However, the privilege being applicable, courts are barred from exercising jurisdiction, and the duty falls upon the House of Congress to punish its offending member. It is not an unfamiliar concept to bar a conviction, regardless of how contemptible the defendant's act may be, in order to protect and preserve an important constitutional principle. This is precisely the doctrine underlying the innumerable cases involving violations of the Bill of Rights and the Fourteenth Amendment. No better examples need be cited than the recent cases of *Mapp* v. *Ohio*[16] and *Gideon* v. *Wainwright*.[17]

Judicial enforcement of the constitutional rights asserted in these two, and in similar, cases goes even further, for it often removes all possibility of punishment, while here sanctions remain unimpaired which may be imposed by the House membership.[18] If these sanctions be deemed insufficient in particular cases, the limitation comes from the Constitution.

A practical reason exists for invoking the congressional privilege, which meets the objective of the constitutional provision. The design is to promote the independence of all congressmen. To avoid restraint on free expression on the floor of either House, protection is given against the hazard and harassment of inquiry in any court. It is no answer, therefore, to say that if the accused member is innocent of accepting a bribe he has nothing to fear. A groundless charge may be sufficient to destroy him at the polls. Moreover, the process of indictment by a grand jury and inquiry

---

[16] 367 U.S. 643 (1961).

[17] 372 U.S. 335 (1963).

[18] Art. I, § 5, cl. 2 of the United States Constitution reads: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

in a court may itself be so devastating that an innocent congressman may well fear it.

It is interesting to note that the Supreme Court has recently used a similar approach in related areas involving potential impediments on constitutional rights. Discussing the oath condemned in *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964), Mr. Justice White said:

> "The uncertain meanings of the oaths require the oath-taker — teachers and public servants — to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall*, 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited."

Similarly in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278 (1964), the court said:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

In that case, Mr. Justice Goldberg in a concurring opinion quoted Judge Learned Hand's summary of the policies underlying the grant of immunity against liability to legislators, judges and executive officers. The same policies apply here.

> " 'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive

not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' * * * Gregoire v. Biddle, 177 F.2d 579, 581." 376 U.S. at 302-03.

In the case of a congressman, the possibility—even the likelihood—of ultimate vindication in a court proceeding is no substitute for the guarantee held out by the Constitution.

Count one of the indictment is unconstitutional as applied to defendant Johnson. But as none of the privileges of Article I, section 6 pertain to the defendants who are not members of Congress, their attack on the first count, unlike Johnson's, is not sustained.

B. COUNTS 2 TO 8

We turn now to the remaining counts of the indictment. Counts 2 to 8 allege substantive violations of 18 U.S.C.A. § 281.[19] Each count charges that Johnson conferred with officials of the Justice Department in an attempt to secure the postponement and eventual dismissal of criminal charges pending against Edlin in Maryland, and that for these services he received compensation.

I. *Venue*

It is conceded that none of the services recited in the indictment was rendered in Maryland. The charge is that Johnson received seven checks—one for each of counts 2 to 8—and that he deposited them all in a Maryland bank. Four of the checks (counts 3 to 6) were drawn on a Maryland bank and three (counts 2, 7 and 8) on a Florida bank. The appellants contend that Maryland was not the proper district in which to try these substantive counts because the checks were delivered to Johnson in Washington, D. C., and that was where "compensation" was received.

Venue is more than a technical concept; it is a constitutional requirement. Article III, section 2, clause 3 commands that "[t]he Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed

---

[19] Section 281 provides, in part:

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

* * *." As pointed out by Justice Frankfurter in *United States* v. *Johnson*, 323 U.S. 273, 275 (1944), the Sixth Amendment "underscore[s] the importance of this safeguard" in requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." See also *United States* v. *Cores*, 356 U.S. 405 (1958).

In the case of *Burton* v. *United States*, 196 U.S. 283 (1905), the Supreme Court had occasion to pass upon the nature of checks as compensation. The indictment in that case charged the defendant, a United States Senator, with the receipt of various checks at St. Louis, Missouri. The case was tried in the United States District Court of Missouri where the evidence showed that the checks, drawn on a St. Louis bank, were in fact delivered in Washington, D. C. The defendant contended, unsuccessfully in the District Court, that Washington, not Missouri, was the proper venue.

The Supreme Court noted that after the defendant received the checks in Washington he endorsed and deposited them in a Washington bank. After a detailed discussion of the relevant banking laws, the Court concluded that the Washington bank became the owner of the checks upon Burton's endorsement and was not his agent for collection from the St. Louis bank. The Court then held:

> "All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eight and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts." 196 U.S. at 304.

The case makes it clear that the place of the delivery of a check is not the sole determinative of venue. If it were, the Court's wrestling with banking laws to determine where the payment of the check occurred would have been needless and irrelevant. *United States* v. *Lotsch*, 102 F.2d 35 (2d Cir. 1939).

Burton does not supply the answer as to venue for all of the substantive counts, but it is conclusive as to counts 3 to 6. In these counts it was alleged that Johnson received checks drawn on one Maryland bank and deposited them in another Maryland bank. Maryland banking law, unlike that in force in Washington, D. C., at the time of the *Burton* case, designates a bank in which a check is deposited, as an agent for collection only. 1 MD. CODE (1957), Art. 11 §§ 119, 121. This presents no problem as to counts 3 to 6, for the bank making final payment, *i.e.*, the drawee bank, and also the bank in which the checks were deposited were both located in the District of Maryland.

The venue for counts 2, 7 and 8 is not as clear, because in these counts the drawee bank was located in Florida, while the depositing bank was in Maryland. *Burton* did not consider the effect on venue where the depositing and paying banks are in different districts.[20]

The Government contends further that on these three counts venue in Maryland can be supported on the theory that when a check is involved, "compensation" constitutes a continuing offense within the meaning of 18 U.S.C.A. § 3237[21] and that a prosecution can be brought for a viola-

---

[20] Justice Harlan dissented from the Court's opinion in *Burton*. He took the view that the Washington bank in which Burton deposited the check was only an agent for collection, and that the St. Louis bank, the drawee bank, was the bank making final payment. Because of this position he, unlike the other Justices, was required to consider the effect on venue where the depositing district and the payment district are different. His conclusion was that venue was properly laid in the District Court at St. Louis.

[21] 18 U.S.C.A. § 3237 read, in pertinent part, as follows:

> "(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

tion of section 281 either where the check was deposited or where it was paid. The proposition is well supported.

In *Benson* v. *Henkel*, 198 U.S. 1, 9 (1905), a prosecution for bribery, the indictment charged that "the defendant unlawfully *gave* to such officer, in the District of Columbia, certain sums of money, with the intent to induce him to do an act in violation of his lawful duty * * *." (Emphasis added). The evidence showed that the defendant had mailed cash from California to the District of Columbia. The contention was that venue lay in California, where the cash was mailed, and not in Washington, where the case was tried. The Court disagreed, noting that "the case is treated as covered by sec. 731 [now 18 U.S.C.A. § 3237], providing that when an offense is begun in one District and completed in another it shall be deemed to have been committed in either, and be tried in either, as though it had been wholly committed therein."

The Government's position is that if *giving* can be considered a continuous act so too can *receiving* which is the same act viewed from the other side. We consider the analogy sound and, like the District Court, adopt it. When Johnson deposited the Florida checks in his Maryland bank for collection he started a chain of events not unlike the mailing of cash in *Benson*.[22]

We are fully advertent to certain language in the *Burton* case which, standing alone, appears to cut the other way.

> "This is not a case of the commencement of a crime in one district and its completion in another, so that

[22] This conclusion does not conflict with Justice Harlan's dissent in *Burton*, noted in n.20. The original prosecution against Senator Burton was brought in the district where, as Justice Harlan concluded, final payment was made on the check, *i.e.*, Missouri. Justice Harlan held this to be proper. In the instant case, had the original prosecution been brought in Florida, the situs of the drawee bank, the continuing offense statute would have supported venue there, as well as in Maryland.

under the statute the court in either district has jurisdiction. Rev. Stat. sec. 731; 1 Comp. Stat. p. 585. There was no beginning of the offense in Missouri. The payment of the money was in Washington, and there was no commencement of that offense when the officer of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri." 196 U.S. at 304.

We agree with the District Court that the above language does not negative the result we reach here. The *Henkel* and *Burton* cases were decided at the same term, and the Supreme Court in *Burton* was merely rejecting a government argument that one is guilty of receiving compensation at the moment a check is sent by the payer. In the instant case the indictment alleged, and the proof established, that Johnson both received and deposited the checks in Maryland.

We conclude, therefore, that the District of Maryland was a proper venue for the prosecution of the substantive counts, 2, 7 and 8, as well as 3 through 6.

2. *Application of Section 281 to Johnson*

It is the appellants' position that counts 2 to 8 fail to state an offense against Johnson because his conversations with offcials of the Justice Department were in his capacity as an attorney in connection with a case pending in court. Hence they contend that section 281 covers neither Johnson as principal nor the others as aiders and abettors. The argument is hollow. Steadfastly throughout the trial Johnson maintained that he was not acting as an attorney. But even if he had maintained the contrary, the mere fact that the conversations related to a pending court proceeding would not bar a prosecution under section 281.

The purpose of section 281 is stated in *United States* v. *Adams,* 115 F. Supp. 731, 734-35 (D. N.D. 1953):

"It [section 281] was aimed at preventing Congressmen, officers and employees of the United States

> Government from using the weight of their positions or their influence in connection with matters which were to be determined before any department, agency court martial, officer or commission and was to assist in insuring the integrity of such departmental determinations."

See also *United States* v. *Burton*, 202 U.S. 344, 368 (1906).

The legislative history of the predecessor to section 281 makes it clear that Congress considered and rejected a proposal to prohibit lawyer-congressmen from appearing as counsel in courts. This policy decision continues to this day, and its rationale is obvious. Governmental departments, agencies, etc., are dependent upon Congress for support, and therefore these bodies are readily susceptible to pressures from individual Senators and Representatives. Courts, on the other hand, are surrounded by protections to assure their independence. A lawyer-congressman's status and influence when he appears in open court are entirely different when he intervenes in a departmental matter. This difference was given legislative recognition.

Senator Trumbull, Chairman of the Senate Judiciary Committee when the statute was originally considered, reported to the Senate that the Committee proposed "to restrain members of Congres * * * from receiving a compensation * * * for doing any business before any Department * * * or anywhere else *except in the judicial tribunals* of the country." Cong. Globe, 38th Cong., 1st Sess. (1864), p. 555 (Emphasis added). He added:

> "This is not a bill to prevent attorneys from practising in courts of law, but it is a bill to prevent Representatives and Senators in Congress * * * from receiving a compensation for advocating claims in the departments and before the bureaus of the government * * *." Cong. Globe, 38th Cong., 1st Sess. (1864), p. 561.

While Edlin in particular stresses this history, it does not support his contention. The evidence was undisputed that Johnson did not enter his appearance in the criminal case pending against Edlin. In fact, the attorney who did represent Edlin in the criminal trial was not even aware of Johnson's efforts in behalf of Edlin.

Edlin also argues that the indictment is defective because, "[t]he plain words of § 281 confine its operation to services in proceedings *pending* before any department, agency or officer of the Government. (Emphasis added). As the District Court noted, section 281 does not use the word "pending." "The words 'before any department, agency,' etc., refer to where the services have been rendered or are to be rendered, not where the proceeding or other matter is pending." 215 F. Supp. 300, 316. The services alleged in the indictment were in relation to a matter in which the United States was a party, namely the criminal charge pending against Edlin; and the services were performed before a department, namely the Department of Justice. As noted above, the Department did have a significant role, and it had the power to take affirmative action as a result of Johnson's visits. Counts 2 to 8 of the indictment as they pertain to Johnson are sufficient. See *United States* v. *Burton*, 202 U.S. 344 (1906); *United States* v. *Quinn*, 111 F. Supp. 870 (E.D. N.Y. 1953). *Cf. United States* v. *Waldin*, 122 F. Supp. 903 (E.D. Pa. 1954); *United States* v. *Adams*, 115 F. Supp. 731 (D. N.D. 1953).

It is not necessary for us to decide whether it is permissible for a congressman who is a lawyer to represent a client, solely before a government department, in relation to his client's court case and yet not enter his appearance in court. The District Court ruled that such activity would be permissible, if the congressman-lawyer disclosed to the department that he is appearing as an attorney and not as a congressman. This conclusion is as favorable as Johnson was entitled to demand, for in the absence of such disclosure

the congressman's appearance would unquestionably violate the plain words of the statute.

3. *Edlin and Robinson as Aiders and Abettors*

A further objection to the validity of the indictment is pressed by appellants Edlin and Robinson. They say that under the applicable decisions no prosecution can be sustained for aiding and abetting a violation of section 281. Decisions directly in point are in conflict. *United States* v. *Bowles*, 183 F. Supp. 237 (D. Me. 1958), supports the appellants while *May* v. *United States*, 175 F.2d 994 (D.C. Cir. 1949), is contra, as is *United States* v. *Quinn, supra.*

Relevant, but distinguishable, is *Gebardi* v. *United States*, 287 U.S. 112 (1932), where the Supreme Court held that in a Mann Act prosecution, a woman whose participation is limited to willfully permitting another to transport her in interstate commerce for purpose of prostitution cannot be tried as a conspirator.[23] See also *Nigro* v. *United States*, 117 F.2d 624 (8th Cir. 1941), and *Lott* v. *United States*, 205 Fed. 28 (9th Cir. 1913).

But the indictment before us is different from those in the above cited cases, and the difference is decisive. This indictment does not charge that Robinson and Edlin aided and abetted in the completion of the offense merely as payers. It goes further. It charges them with a far more active role—"aiding, abetting, counselling, commanding, inducing and procuring." This charges conduct in *addition* to the mere payment of money necessary to complete a violation of section 281.[24]

---

[23] *Cf. United States* v. *Holte*, 236 U.S. 140 (1915).

[24] In *Bowles* the indictment apparently averred only that the alleged aiders and abettors had paid money. The court's opinion indicated no other acts of assistance. The same is true of *Nigro* and *Lott*. Because of the difference between these cases and ours, we are not required to rule on whether mere payment would be sufficient to sustain a charge of aiding and abetting.

II. DISCLOSURE OF THE GRAND JURY TRANSCRIPT

Prior to trial, Johnson moved for the production of his grand jury testimony. He supported his motion with an affidavit setting forth his reasons. In part, the affidavit reads:

> "By reason of the length of the interrogation, the intensity at times with which it was conducted and the fact that I was tired physically and mentally from my work in the House of Representatives and my vigorous campaign for reelection on the Eastern Shore, I do not recollect a considerable part of my testimony."

The District Court denied the motion.

Later, it was disclosed that the Government, before the trial, had permitted a government witness to examine the witness' grand jury testimony. The witness' attorney was accorded the same opportunity, and together they read a volume of the transcript containing the witness' testimony and the testimony of others. The appellants moved the court for the production of all the grand jury testimony on the ground that the Government had breached "the veil of secrecy" usually surrounding grand jury records. This motion also, the court denied. But the court made available to the appellants the volume of testimony revealed by the Government. We find no error in either of these rulings.

The practice of shielding grand jury proceedings from discovery is long-established and rests on sound policy.[25]

---

[25] Perhaps the most frequently cited justification for the practice is found in *United States* v. *Rose*, 215 F. 2d 617, 628-29 (3rd Cir. 1954). There the court summarized the reasons for the rule as follows:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its delibarations, and to prevent persons sub-

Costello v. *United States*, 350 U.S. 359, 362 (1957); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943). In recent years the Supreme Court has reaffirmed its commitment to this practice. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), *affirming* 260 F.2d 397 (4th Cir. 1958); *United States* v. *Proctor & Gamble*, 356 U.S. 677 (1958).

Of course, where there is a particularized need for grand jury minutes, it is within the sound discretion of the district court to require their production. *Pittsburgh Plate Glass Co.* v. *United States, supra; United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 231 (1940). But it is manifest from a reading of Johnson's affidavit that he showed no particularized need. His justification for requesting his testimony is not different from that of any other defendant. If his motion were to be granted then all similar motions would have to be granted automatically regardless of any showing of particularized need. It is difficult to imagine a defendant who could remember all of his grand jury testimony, or who was not emotionally strained when giving it. No special impact on Johnson is made to appear and there is no showing of a threatened injustice from the denial.

Likewise, the fact that the Government, in preparation for the trial, disclosed a volume of the transcript to one of its witnesses does not require the complete abandonment of secrecy. Secrecy is maintained for the benefit of the grand jury and for the betterment of grand jury proceed-

---

ject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

ings. *United States* v. *Smyth*, 104 F. Supp. 283, 304 (N.D. Cal. 1952). Where it becomes necessary to breach the secrecy of the proceedings, it should be done "discreetly and limitedly." *United States* v. *Proctor & Gamble*, 356 U.S. 677, 683 (1958). This is what the Judge did. He repaired any possible damage to the defendants and equalized the situation by permitting them to examine the same testimony which was shown to the government witness.

III. SUFFICENCY OF THE EVIDENCE

The appellants complain that the evidence is insufficient to support the verdict. To a large extent their contentions merely repeat the arguments made in their attack on the indictment. For example, arguing the insufficiency to support a finding of a section 281 violation, Edlin reintroduces his concept of the statutes,[26] and follows through with the assertion that there was no evidence showing a violation of section 281 as he defines it.

The trial was long, extending over eleven weeks, and the record is mammoth, consisting of 41 volumes of 5600 pages of testimony and many exhibits. We have closely examined this mass of material and have carefully considered the arguments. To restate all of the evidence here would be a useless exercise. The posture of the case, on appeal from a judgment of conviction, requires us to view the evidence in the light most favorable to the Government. For the present purpose, a condensed statement will suffice.

Appellant J. Kenneth Edlin was the dominating force in two Maryland savings and loan associations, First Colony Savings and Loan Association and First Continental Savings and Loan Association. Robinson was Edlin's associate and an officer in each of these associations. According to Martin Heflin, a public relations man, Edlin and Robinson consulted him in April, 1960, about the possibility

[26] See section IA1, *supra*.

of having a speech delivered in Congress in behalf of savings and loan institutions. Robinson made an initial draft of such a speech and sent it to Heflin who edited it and inserted the words "Mr. Speaker" at appropriate places. Heflin, however, pointed out to Robinson and Edlin that there was no reason to make the speech at that time, and that no one "could be justified in making a speech."

The next month, May, 1960, Heflin, Edlin and Jackson Rains, an accountant for First Colony, met with Congressman Johnson in a Washington restaurant where they discussed the situation of Maryland savings and loan associations. Johnson asked Heflin to send him a resume of the meeting.

On June 30, 1960, Johnson delivered the speech on the floor of the House of Representatives. Johnson testified that the speech was prompted by an unfavorable newspaper article in the May 27, 1960, edition of the Washington Star, and by his own desire to create a political issue for the upcoming congressional election. The newspaper article, however, was a relatively minor one and appeared on an inside page. On cross-examination Johnson admitted that he never had any complaints from his constituents concerning the article or even about savings and loan associations in general, and that no constituent had requested him to make a speech. He also admitted that he made no mention of the speech either in his customary weekly newletter to constituents or during his campaign.

Johnson also testified that his administrative assistant, Manual Buarque, wrote the speech with the aid of information supplied by Heflin. Buarque testified to the same effect. But other evidence cast grave doubt on the truthfulness of this testimony. Another version of the authorship of the speech came from Accountant Rains, who testified that immediately before or after the speech was delivered Edlin showed him a copy. Rains also testified that on July 4, 1960, on a plane trip from Maryland to Florida,

Robinson and Edlin joked about the authorship of the speech. His testimony was:

> "Everyone was in good spirits. Mr. Edlin and Mr. Robinson were sitting together and they were showing the speech back and forth and saying, jokingly, or facetiously, 'How do you like the speech I write,' and the other one would say 'What do you mean, you wrote it? I wrote it,' and that sort of thing."

Ten days before the speech, Robinson sent Johnson a check for $500. Both men claimed at the trial that it was a campaign contribution, but the evidence showed that when the check was drawn Robinson's bank account was insufficient to cover the sum, and that immediately thereafter he deposited a $300 check from First Colony. First Colony recorded the check as a legal expense.

First Continental Savings and Loan thereafter ordered 50,000 reprints of the speech, underlined in red at significant portions and used to attract depositers.

It is important to note here that as of 1959, Edlin, together with Rains and First Colony, were under indictment in the District Court of Maryland for mail fraud. Rains testified that when Edlin showed him the speech, he reassured him about the pending indictment. According to Rains, Edlin said "[Y]ou see, we have friends on the Hill —we have nothing to fear on our indictment. These people are interested in us and the injustice we have been done."

The testimony of Edlin's secretary, Mrs. Sadie Goldman, was significant. She testified that in the first week of June, 1960, (before the speech) Edlin came into the office in an unusually good mood and told her: "Well, I have made a new contact. There is no stopping us now. The sky's the limit. We'll have a chain of banks, Sadie, we are going to be rich. Seriously, Sadie, it is a Congressman." She also testified that she later asked Robinson why Edlin was so excited. Robinson asked her if she had ever heard of

Congressman Johnson, and when she said she had not, Robinson told her, "You will hear plenty about him now. He is on our payroll. It is costing Ken [Edlin] plenty."

Johnson claimed at the trial that when he made the speech he did not know that an indictment was pending against Edlin. Buarque, the Congressman's administrative assistant, testified that he was aware of the indictment but did not inform Johnson. In closing arguments, the Government maintained that in the context of the events both Johnson's and Buarque's testimony was "incredible."

In addition, Mrs. Goldman said that in July, 1960, she asked Robinson what would happen to her job if Edlin were convicted. Robinson replied, "You have nothing to worry about. The Congressmen are being paid well and Ken [Edlin] will never go to jail. Don't worry."

The evidence is uncontradicated that Congressman Johnson did receive the checks mentioned in the indictment and that when he, together with Congressman Boykin, spoke to the Attorney General and other members of the Justice Department in behalf of Edlin, he did not tell them that he was appearing as an attorney.

Both Robinson and Edlin conferred with Johnson a number of times as to the best approach to the Department. Robinson also prepared an analysis of the indictment for presentation to the Justice Department.

Louis Goldman, an attorney, testified that "Mr. Edlin from time to time would say that he had nothing to worry about the indictment. That his friends on the Hill would take care of it for him and that everything would turn out all right." In response to the question whether Edlin ever referred to costs, Goldman answered: "From time to time Mr. Edlin would say that it is costing him a lot of money and that the cost is eating him up." He also testified that on one occasion, noticing that Edlin looked worried—

"I asked him what was wrong, and at that time he told me that he was concerned with the fact that Congressman Boykin and Congressman Johnson were not getting anywheres with his indictment; that it was costing him a lot of money. When I asked him what he meant by that, he stopped for a minute, looked at me, and said, 'Forget it.' That was the end of that."

At the trial the appellants claimed that the checks listed in the indictment represented payments to Johnson for valid legal services. It was the Government's contention that to a large extent the alleged legal services were either performed by other attorneys or not performed at all. Our examination of the record leads to the conclusion that there was ample basis, both in the testimony in chief and in cross-examination of Johnson and Robinson, for the jury to believe that the appellants' explanation for the checks was false and that the money was paid to Johnson for making the speech and for using his influence in the Department of Justice.

For example, in his direct testimony Johnson related that he had performed legal services on 305 mortgages to the Cassell Land Company. His testimony was that over $1,600,000 was involved and that his job was to review the mortgages, half of which he found to be defective. To correct the defects, he testified, he and another lawyer drew up one confirmatory mortgage. On cross-examination, he said he could not remember giving this testimony on direct, but repeated that there was a confirmatory mortgage. However, it was shown that before the Montgomery County Grand Jury he swore that he redrafted each of the defective mortgages. Faced with the conflict, he admitted that the grand jury testimony was incorrect. The prosecution then confronted him with a prepared statement he had issued, to the effect that "new *indentures* had to be made to correct the mistakes [in the mortgages]." (Emphasis

added). In addition to this obvious conflict, he then acknowledged on cross examination that he did not prepare the confirmatory mortgage, but that another lawyer did.

Again, in direct testified Johnson had said in reference to a proposed loan to the Savarin Development Corporation: "I did participate in the preparation of the entire loan agreement, the mortgages." Yet he later conceded that he did not mention the loan to the grand jury and, on cross-examination, stated that Robinson actually prepared the loan papers.

Two attorneys who assertedly worked with Johnson testified that they and not Johnson performed the legal work. One, Carrico, testified that shortly before the trial Johnson visited him and asked him to sign a prepared statement concerning Johnson's legal services. Carrico refused because the proffered statement recited that Johnson had visited him to discuss a foreclosure—a statement Carrico would not confirm and his records did not reflect.

Moreover, Johnson introduced into evidence many legal documents on which he had placed penciled notations. On cross-examination, however, a revealing light was shed when it was shown that Johnson had earlier given photostats of these same documents to the FBI and that the photostats were without the penciled marginal notes. Johnson had also furnished the FBI a photostat of a letter he had allegedly written to Robinson discussing the validity of a long agreement. The letter bore a Berlin, Maryland, return address, but its authenticity was impeached by the telephone company's records showing that throughout the day the letter was supposed to have been written in the town of Berlin, on the Eastern Shore of Maryland, Johnson placed long distance phone calls from his Washington office.

Robinson testified that Johnson was on a retainer, yet a statement he made to the FBI did not reflect this. On the contrary, in the FBI report, which he signed, he declared

that particular checks were paid to Johnson for specific legal services. The checks, specified in the indictment, aggregating $17,550, which the appellants now claim were for legal services, are far in excess of the $6000 to $7500 claimed by Robinson in his interview with the FBI agent.

This testimony is representative of much more to the some effect. If believed by the jury, as it obviously was, it is more than sufficient to support the jury's verdict.

IV. ALLEGED PREJUDICIAL TRIAL ERRORS

A. FBI Agents' Testimony

At trial, the defense insisted that the checks specified in the indictment were payments to Johnson for legitimate legal services. Robinson and Johnson so testified. They both also testified that Johnson was on a retainer from the savings and loan associations controlled by Edlin.

To rebut this testimony, the Government called as a witness the FBI agent who had interviewed Robinson on January 11, 1962. In the course of the interview the agent made notes, then returned to his office and, from these notes, dictated a narrative statement which was subsequently typed and presented to Robinson. Robinson read, corrected and signed the statement. A copy was given to him.

The agent testified that in the interview Robinson made no mention of any retainer fee having been paid to Johnson. He also testified that after the statement was signed Robinson added that the total fees paid to Johnson were between $6000 and $7500. If believed by the jury it meant that the appellants' evidence that Johnson was on a retainer was probably false. The suggested inference is that if he were on a retainer, as now claimed, Robinson would have mentioned this fact to the agent. Moreover, the $6000 to $7500 testified to by the agent as the sum Robinson claimed to be the total legal fees, was far below that claimed by the appellants at the trial.

On cross-examination, the agent stated that after he dictated Robinson's statement he destroyed the interview notes in accordance with the then customary FBI procedure. The completed and signed statement of Robinson, which was made part of the agent's report, was retained in the FBI files. The agent further testified that while he was not aware at the time of the interview that Robinson was being investigated, he did recognize the possibility that Robinson might be called as a witness in a prosecution against Johnson. Robinson moved to strike the agent's entire testimony for the reason that the original notes of the interview had been destroyed. The court denied the motion and ruled the evidence admissible against Robinson, though not against Edlin.

Another FBI agent testified to an interview he had with Johnson's administrative assistant, Manuel Buarque. This agent's testimony was offered in rebuttal of certain testimony given by Buarque as a defense witness. At the interview, the agent made notes from which he later prepared his report. Buarque did not sign the report. Johnson's counsel moved that the agent's testimony be stricken because of the destruction of the notes. Again the trial court denied exclusion. Buarque, like Robinson, was furnished a copy of the report.

Appellant Robinson argues that the destroyed notes were a produceable "statement" under the Jencks Act, 18 U.S.C.A. § 3500, and that their willful destruction by the FBI required the agents' testimony to be stricken.[27] If the notes can qualify as a "statement," a serious question arises.

---

[27] 18 U.S.C.A. § 3500(d) reads as follows:

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

This is not the first time that a court has been called upon to consider the effect of the destruction of FBI interview notes. *Campbell* v. *United States,* 373 U.S. 487 (1963); *Killian* v. *United States,* 368 U.S. 231 (1961); *Ogden* v. *United States,* 323 F.2d 818, 820-21 (9th Cir. 1963); *United States* v. *Greco,* 298 F.2d 247 (2d Cir. 1961). Each time the problem has arisen the FBI has claimed that the notes were destroyed as part of FBI routine. This is really not a satisfactory answer. Where the agent testifies to matter he claims not to be in the notes and the defendant insists on a different version, an issue arises which may not be satisfactorily resolved in the absence of the original notes. If the notes were available, they might confirm or refute one version or the other. One of the purposes of both the *Jencks* decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses. *Palermo* v. *United States,* 360 U.S. 343 (1959); *United States* v. *Wenzel,* 311 F.2d 164, 171 (4th Cir. 1962). The destruction of interview notes does not advance this purpose. Of course, a district court may find as a fact that the notes were not a substantially verbatim record, or that they were accurately copied into a report and then destroyed in good faith, but the necessity for inquiries along this line can be avoided by the preservation of notes until after the trial. Eliminating uncertainty may serve the interest of the Government no less than the defendant.

However this may be, as we view the Jencks Act, the notes in question do not qualify either as a "statement" or as a "report" as these terms are defined in the Act. Subsections (a), (b) and (e) are pertinent.

> "(a) In any criminal prosecution brought by the United States, *no statement* or report in the possession of the United States which was *made by a Government witness* or prospective Government witness (other than the defendant) *to an agent of the Government* shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) *After a witness called by the United States has testified* on direct examination, the court shall, on motion of the defendant, order the United States to produce *any statement (as hereinafter defined) of the witness* in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * *

"(e) The term 'statement,' * * * in relation to any *witness called by the United States* means—

(1) a written *statement made by said witness* and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement *made by said witness to an agent of the Government* and recorded contemporaneously with the making of such oral statement." (Emphasis added).

The italicized portions require that the obtainable "statement or report in the possession of the United States" must be made *by the witness,* and the witness must be a *government witness.* By its terms, the Act does not cover statements made either by a defendant or by a defense witness.

The FBI agents' reports were within the Jencks Act because in each instance the "report * * * was made by a Government witness * * * to an agent of the Government." *Holmes* v. *United States,* 271 F.2d 635 (4th Cir. 1959). Copies of these verified statements were, as heretofore shown, in the defendants' possession. Assuming that the notes the agents made when interviewing Robinson and Buarque were "substantially verbatim recital[s] of oral statement[s]," they were at most statements of Robinson and Buarque, not statements "made by a Government witness."

Both FBI agents testified to their present recollection of the interviews. It was for the jury to consider the reliability and weight of their testimony, as compared to the testimony given by Robinson and Buarque.

B. Alleged Comment on Edlin's Failure to Testify

Edlin claims that the prosecutor improperly commented on his failure to take the stand. The incident referred to occurred at the end of the Government's closing summary to the jury. After pointing out asserted inconsistencies in the appellants' positions, the prosecutor spoke these words:

> "Members of the Jury, the defendant Edlin has presented no defense in this case. He has presented no evidence to contradict the charges against him. He has produced no evidence to deny numerous statements made by many, many government witnesses. He has produced no evidence to deny the testimony of numerous witnesses of his various activities which clearly indicate beyond any doubt, Members of the Jury, his guilt of the charges in this indictment."

In *Davis* v. *United States*, 279 F.2d 127 (4th Cir. 1960), a similar argument was presented. The answer we gave applies with equal force here:

> "The United States Attorney's argument cannot be said to have constituted a forbidden comment on the failure of the defendants to testify. He merely reviewed certain testimony and added, truthfully, that there was no evidence in contradiction."

The prosecutor did not draw improper attention to Edlin's refusal to testify. He merely pointed out that the defense did not introduce evidence to contradict certain of the prosecution's witnesses. Edlin was not the only person who could have rebutted the Government's witnesses, *Leathers* v. *United States*, 250 F.2d 159, 165 (9th Cir. 1957).

The prosecutor addressed himself to the absence of anything in the record to contradict the Government's version of the case. Under these circumstances his comment was not improper. *Davis* v. *United States, supra; Garcia* v. *United States,* 315 F.2d 133, 137 (5th Cir. 1963).

C. Alleged "Totality of Prejudice"

Edlin launches a more general attack on the trial, claiming that evidence admitted against one or more of his co-defendants constituted "in its totality" prejudice as to him. This amounts to no more than a continuation of his argument, dealt with earlier, that conspiracy cases in general often produce evidence against one defendant which may prove prejudicial to his co-defendant.

We have closely examined the numerous references to the record and find that they do not show the claimed "totality of prejudice." The record attests the close and careful attention the trial judge gave to questions of the admissibility of evidence. Wherever necessary he instructed the jury that evidence admissible only against certain appellants should not be considered against the others. We have earlier in this opinion pointed out the dangers inherent in conspiracy trials, but as long as Congress authorizes prosecutions for conspiracy and the Supreme Court adheres to its holdings that the Constitution does not proscribe them, we must rely in large measure on the alertness of district judges to protect the interests of the individual defendants by properly cautioning the jury as to the purpose and effect of particular items of testimony. Indeed, the problem is potentially present whenever two or more defendants are jointly tried on any charge. The District Judge showed himself sensitive to the delicacy of his function as governor of the trial, and whenever the situation called for a specific instruction to the jury, appropriate instruction was given.

Where the trial judge finds that a defendant has been unduly harmed or his trial made unfair, he should in the interest of justice grant a new trial. *United States* v.

Decker, 51 F. Supp. 20, 25-26 (D. Md. 1943). Upon full consideration, we cannot say that Edlin had an unfair trial. In the particular rulings, and in the totality of the trial we perceive no unfairness.

D. Instructions to the Jury

Each of the appellants presses the contention that certain portions of the court's charge to the jury were erroneous. First, it is said that the court committed reversible error in refusing to instruct the jury to acquit unless they found that the alleged legal services performed by Johnson were a "sham and pretense." The court refused the tendered instruction "because there is no requirement on the Government to prove sham and pretense."

The Government did not claim, nor was it necessary for it to show, that Johnson performed absolutely no legal services. The appellants' requested instruction, if granted, was susceptible of being understood by the jury as requiring it to find a set of facts beyond that charged by the Government. The court dealt with the subject adequately and avoided the possibility of misunderstanding when it told the jury that receipt of the compensation was illegal if it was, "in whole or in substantial part" for services rendered before the Department of Justice. This was unquestionably appropriate to direct the jury to the issue impartially. *United States* v. *Burton*, 202 U.S. 344 (1906).

The appellants also contend that the District Court erred in refusing their requested instruction on circumstantial evidence. This would have required the jury to disregard all circumstantial evidence unless it excluded every reasonable hypothesis except guilt. In *Holland* v. *United States*, 384 U.S. 121, 139-40 (1954), the Supreme Court explicitly rejected this formulation. Justice Clark, who wrote for a unanimous Court, emphasized that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect [citations omitted]." Here the court did instruct on reasonable doubt, using the formulation ap-

proved by the Supreme Court in *Holland*. Refusal of the tendered instruction was not error. *United States* v. *Lawrenson*, 298 F.2d 880, 884 (4th Cir. 1960); *Milanovich* v. *United States*, 275 F.2d 716, 721 (4th Cir. 1960), *rev'd on other grounds*, 365 U.S. 551 (1961).

Edlin requested an instruction to the effect that the jury could consider whether his actions were based upon the advice of counsel in determining his intent and good faith *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir. 1963). The Judge's charge incorporated the substance of the requested instruction, and refusal to adopt Edlin's very words was not error. Other requested instructions were rejected, but we find no error, because insofar as they asserted valid propositions of law they were in essence embodied in the charge.

V. CONCLUSION

Though we find the evidence sufficient to support a guilty verdict on all counts, the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts. Many of the events testified to at the trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. The conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts. The judgment against Johnson is therefore vacated and the case remanded for a new trial on the counts charging violations of 18 U.S.C. § 281. As to Edlin and Robinson, the convictions are affirmed.

Judgment as to Johnson vacated and a new trial ordered with instructions; judgment as to Edlin and Robinson affirmed.

Judgment

Filed and Entered September 16, 1964

United States Court of Appeals for the Fourth Circuit

No. 9223

UNITED STATES OF AMERICA, *Appellee*

v.

THOMAS F. JOHNSON, J. KENNETH EDLIN, AND WILLIAM L. ROBINSON, *Appellants*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court as to Thomas F. Johnson appealed from, in this cause, be, and the same is hereby, vacated, and that the cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein; and that the judgments of the said District Court as to J. Kenneth Edlin and William L. Robinson appealed from, in this cause, be, and the same are hereby affirmed.

/s/ SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

/s/ CLEMONT F. HAYNSWORTH, JR.
United States Circuit Judge.

/s/ JOHN D. BUTZNER, JR.,
United States District Judge.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provision involved	3
Statement	3
Argument	6
Conclusion	15

CITATIONS

Cases:

Campbell v. *United States*, 373 U.S. 487	11
Garcia v. *United States*, 315 F. 2d 133, certiorari denied, 375 U.S. 855	14
Gober v. *City of Birmingham*, 373 U.S. 374	9
Killian v. *United States*, 368 U.S. 231	10, 11
Lawn v. *United States*, 355 U.S. 339	8
Needelman v. *United States*, No. 278, O.T., 1959, certiorari dismissed as improvidently granted, 362 U.S. 600	10
Ogden v. *United States*, 323 F. 2d 818, certiorari denied, 376 U.S. 973	11
Palermo v. *United States*, 360 U.S. 343	10
Peeples v. *United States*, 341 F. 2d 60, certiorari denied, 380 U.S. 988	14
Peterson v. *Greenville*, 373 U.S. 244	9
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	13
Shuttlesworth v. *Birmingham*, 373 U.S. 262	9
United States v. *Greco*, 298 F. 2d 247, certiorari denied, 369 U.S. 820	11

220-900—66——1

Cases—Continued Page

United States v. *Hilbrich*, 341 F. 2d 555, certiorari denied, 381 U.S. 941 11

United States v. *Johnson*, 383 U.S. 169 ..... 4, 6, 7

United States v. *Procter & Gamble*, 356 U.S. 677 13

United States v. *Provenzano*, 334 F. 2d 678, certiorari denied, 379 U.S. 947 9

Constitution, statutes, and rule:

Constitution of the United States, Article I:

Section 5 6

Section 6 ..... 3, 4, 6

18 U.S.C. 281 3

18 U.S.C. 371 3

18 U.S.C. 3500 10

Rule 6(e), Fed. R. Crim. P 13

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1345

J. KENNETH EDLIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1733 Misc.

WILLIAM L. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (XV R. 42–90)[1] is reported at 337 F. 2d 180. The opinion of the dis-

[1] "R." preceded by volume number designates the certified record on file with the Clerk of this Court, consisting of fifteen folders containing, *inter alia*, the trial transcript (Volumes V–XIV) and the proceedings in the court of appeals (Volume XV).

trict court (I R. 309–335) is reported at 215 F. Supp. 300.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1964 (XV R. 92). Timely petitions for rehearing and/or rehearing *en banc* (XV R. 111–140; 142–158) were denied on March 24, 1966 (XV R. 165). On timely application, the Chief Justice extended the time for the filing of a petition for a writ of certiorari in No. 1345 until May 23, 1966, and the petition was filed on that date. The Chief Justice also extended the time for the filing a petition in No. 1733 Misc. until May 23, 1966, without prejudice to the full Court's consideration of whether the application for the extension was filed in time,[2] and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitutional Speech or Debate Clause bars the prosecution of persons who are not members of Congress on a charge of conspiracy if the government's proof includes evidence pertaining to the content and motivation of a legislative speech made by a Congressman.

2. Whether petitioners were properly convicted as aiders and abettors of a Congressman's violation of a conflict-of-interest statute even though the Congress-

[2] The extension of time in No. 1733 Misc. was sought on May 5, 1966, more than 30 days after the denial of rehearing by the court of appeals. The petition is accordingly out of time under Rules 22–2 and 34–2 of the Rules of this Court.

man's conviction was reversed and remanded for a new trial.

3. Whether petitioner Robinson was entitled to the production of grand jury testimony and notes taken by a government witness.

4. Whether evidence of prior misconduct was improperly admitted against petitioner Edlin.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6, of the United States Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

Petitioners were convicted together with former Congressmen Thomas F. Johnson and Frank W. Boykin in the United States District Court for the District of Maryland on one count of conspiracy to defraud the United States of the services of the two Congressmen (18 U.S.C. 371) and seven substantive counts charging that they aided, abetted, counselled and commanded Congressman Johnson to violate the federal conflicts of interest statute (then 18 U.S.C. 281) (I R. 14–44; XIV R. 6335–6348). Petitioner

Edlin was sentenced to a one-year prison term on each count, the sentences to run concurrently, and fined a total of $16,000 (II R. 631). Petitioner Robinson was sentenced to a concurrent six-month term of imprisonment on each count (II R. 632).

Finding the evidence "more than sufficient," the court of appeals affirmed petitioners' convictions on all counts (XV R. 80, 89). The court held that "none of the privileges [of the Speech or Debate Clause, Article 1, Section 6] pertain to the defendants who are not members of Congress" (XV R. 62). At the same time, the court reversed Congressman Johnson's conviction on the conspiracy count on the ground that the Speech or Debate Clause did bar the prosecution of a Congressman for accepting money to make a speech in Congress. It also vacated Johnson's conviction on the substantive counts, remanding for a new trial thereon, on the ground that the impermissible evidence relating to the speech prejudiced his trial on these counts (XV R. 62, 89). This Court affirmed the reversal as to Congressman Johnson without reviewing the ruling on the substantive counts. *United States* v. *Johnson,* 383 U.S. 169.[3]

The pertinent evidence—the sufficiency of which is not in dispute—is set out in the opinion of the court of appeals (XV R. 42–90), and in the government's principal brief in *Johnson* (No. 25, O.T., 1965, pp. 3–7). Insofar as relevant it may be summarized as follows:

---

[3] Congressman Boykin, who did not appeal his conviction, was pardoned by the President on December 17, 1965.

In 1960 and 1961 petitioner Edlin was the dominant figure of First Colony and First Continental Savings and Loan institutions and was under indictment for mail fraud in connection with the activities of First Colony. Petitioner Robinson was Edlin's associate and an officer of each of these organizations. In May 1960, petitioners communicated with Congressman Johnson. Robinson thereafter supplied material for a speech which the Congressman delivered on the floor of Congress on June 30, 1960, in behalf of independent savings and loan associations. In the first week of June, Robinson told Edlin's secretary that Congressman Johnson was "on our payroll." On June 20 Robinson sent Johnson, allegedly as a campaign contribution, a check for $500. The funds had been supplied in part by First Continental. Immediately before or immediately after the speech was given, Edlin displayed a copy of its text, commenting that there was no reason to fear the mail fraud indictment since "we have friends on the Hill." Reports of the speech were purchased by First Continental which distributed them to influence potential savers to deposit funds in the Edlin-controlled savings and loan institutions.

Thereafter, through most of 1961, Congressmen Johnson and Boykin made numerous visits to officials of the Department of Justice in an effort to convince the Department to dismiss the indictment pending against Edlin. Johnson received substantial amounts of money from Robinson and First Continental for these services.

ARGUMENT

1. In *United States* v. *Johnson,* 383 U.S. 169, this Court held that the Speech or Debate Clause of the Constitution (Art. 1, Sec. 6) barred prosecution of a Congressman on a charge of conspiracy if proof of the offense involved an inquiry into the content and underlying motives of a speech which the Congressman had delivered on the floor of the House. Petitioners contend that their convictions must also be reversed because unfettered legislative speech is endangered by any prosecution in which the motives of such speech are questioned irrespective of whether the Congressman who delivered the speech is personally named as a defendant.

This argument misconceives the nature and purpose of the constitutional Speech or Debate privilege. The privilege applies, by its terms, only to members of Congress—"*they* shall not be questioned * * *." [Emphasis added.] And it prohibits only inquiries and punishment outside the legislative chamber—"* * * in any *other* Place." [Emphasis added.] The Constitution reserved for Congress the power to punish improper speech of its members in the legislative chamber.[4] Indeed, the court of appeals emphasized that "the Constitution has clothed the House of which [Congressman Johnson] is a member with the sole authority to try him" (337 F. 2d at 190) and that "sanc-

[4] See Article 1, Section 5 of the Constitution providing in pertinent part: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member."

tions remain unimpaired which may be imposed by the House membership" (*id.* at 191).

The authority of Congress to punish its members is an integral aspect of the privilege. It demonstrates that the purpose of the Speech or Debate Clause was to keep legislative speech free from executive or judicial limitation and thereby to maintain the separateness of the three branches of government. This purpose of the Speech or Debate Clause was emphasized by this Court in *Johnson* (383 U.S. at 182):

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, *in the context of the American system of separation of powers, is the predominant thrust of Speech or Debate Clause.*[5] * * * [Emphasis added.]

Nothing said or implied in *Johnson* supports the proposition that the privilege extends to private parties such as petitioners who are not Senators or Representatives. The policy underlying the privilege compels the opposite result. Since private parties are not subject to congressional punishment for their role in causing improper conduct in the legislative chamber, such persons would have absolute immunity if they could not be punished in a judicial proceeding involving inquiry into a speech delivered in Congress.

---

[5] And again (*id.* at 178): "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." See also *id.* at 181.

220-900—66——2

In effect, the rule proposed by petitioners would mean that they, unlike Congressmen, would be immune from prosecution and punishment "in any place," not merely "in any *other* Place" (emphasis added).

Nor is there substance to the claim that the prosecution of private parties like petitioners would have a "chilling effect" on legislative debate. The degree of "questioning" involved in the prosecution of a person who is not a Congressman—particularly where, as here, the buying of the speech is part of a larger conspiracy to defraud the United States—is substantially less of an inhibition upon speech than if a Congressman himself may be compelled to defend his motives. It is true that the Speech or Debate Clause safeguards untrammelled legislative debate. But it is meant to serve this end only where the Constitution affords some remedy within the legislative branch. The privilege is, in other words, a personal right belonging only to the Senator or Representative making the speech; the Constitutional draftsmen surely did not intend, we submit, to immunize from all punishment those who were accessories to an improper speech but who are beyond the reach of the legislature's power to "punish its Members."

2. Petitioners' contention that they could not be convicted as Johnson's aiders and abettors on the seven substantive counts because his conviction was reversed is unsound.[6] The court of appeals reversed

[6] With regard to petitioner Robinson, the sentences on the substantive counts were concurrent with the conspiracy sentence. Hence the judgment is supportable on the conspiracy count alone. See *Lawn* v. *United States*, 355 U.S. 339, 359. While petitioner Edlin's prison sentences were also concurrent, he was fined separately on each count.

Johnson's convictions on the substantive counts not because the proof was insufficient to establish his guilt but because proof concerning the speech—which he was personally privileged to have excluded—must have affected the jury's consideration on the substantive counts. Since, as we have shown above, petitioners were not entitled to have evidence pertaining to the speech excluded, their convictions on the substantive counts were clearly untainted by any impermissible proof. Cf. *United States* v. *Provenzano,* 334 F. 2d 678, 691 (C.A. 3), certiorari denied, 379 U.S. 947. The reversal of aider and abettor convictions by this Court in *Shuttlesworth* v. *Birmingham,* 373 U.S. 262, 265–266, is readily distinguishable since that decision rested on the finding that the conduct which defendants were charged with having aided and abetted was "an innocent act" and not a crime at all. See *Gober* v. *City of Birmingham,* 373 U.S. 374; *Peterson* v. *Greenville,* 373 U.S. 244.

3. Petitioner Robinson's contentions concerning the court's refusal to order the production of notes and grand jury testimony are without merit.

a. The government called F.B.I. Agent Strickland as a rebuttal witness. He testified that during his January 1962 interview with petitioner Robinson the latter showed him a check for $1,000 made out to Congressman Johnson, dated August 30, 1960, and advised the agent that the check was in payment for legal fees. Robinson also told the agent that Johnson had received other fees ranging from $6,000 to $7,500

but he did not mention any retainer arrangement (XIII R. 5476–5481).[7]

Agent Strickland further testified that he had taken notes at the interview but that these had been destroyed in accordance with F.B.I. procedure after they had been used to prepare a formal report (XIII R. 5479–5482, 5484–5485).[8] Agent Strickland's report—which he characterized as a "verbatim copy" of what Robinson had told him (XIII R. 5484)—was prepared at the time of the interview and was shown to Robinson, who made some corrections and signed it. This report was made available to the defense (XIII R. 5479–5480).

The district court properly denied the defense motion to strike the agent's testimony (XIII R. 5486–5487). Even if the notes in question were producible "statements" under 18 U.S.C. 3500—which, we submit, they were not[9]—it is clear that their destruction was not improper. This Court's ruling in *Killian* v.

[7] Robinson had testified that Johnson was employed on a retainer basis, receiving a fee of $800 per month between January and April 1961, and a fixed fee of $25,000 thereafter (XI R. 4282–4285).

[8] See the similar testimony of F.B.I. Agent Milne concerning notes of an interview with Congressman Johnson's administrative assistant (XIII R. 5468–5475).

[9] The notes were personal jottings retained by the interviewer and not communicated to the person interviewed or to any government agent. Compare *Palermo* v. *United States*, 360 U.S. 343, and the government's brief in *Needelman* v. *United States*, No. 278, O.T., 1959, pp. 17–31, certiorari dismissed as improvidently granted, 362 U.S. 600.

United States, 368 U.S. 231, 242, is fully applicable here:

> At to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. * * *

See also *United States* v. *Hilbrich,* 341 F. 2d 555, 557 (C.A. 7), certiorari denied, 381 U.S. 941; *Ogden* v. *United States,* 323 F. 2d 818, 820–821 (C.A. 9), certiorari denied, 376 U.S. 973; *United States* v. *Greco,* 298 F. 2d 247, 249–250 (C.A. 2), certiorari denied, 369 U.S. 820.[10]

b. A few days before the trial, Francis Finneran—then a potential government witness, but in fact called as a defense witness at the trial (XIII R. 5019)— appeared, at the government's request, with counsel at

[10] The holding in *Campbell* v. *United States,* 373 U.S. 487, in no way undermines *Killian.* In *Campbell,* unlike the situation here and in *Killian,* the "precise words" in the destroyed notes were read to the interviewee, who "had adopted this presentation" as his own (373 U.S. at 491–492).

the United States Attorney's office for an interview. He had been asked to bring along his employee, Walter Schultise, but the latter could not attend. Because Finneran thought "it would refresh his recollection" (V R. 9), he and his attorney were permitted to examine, for approximately thirty minutes, the volume of grand jury minutes containing his own testimony and that of Schultise (V R. 10). They also had access to and may have examined the testimony of one James L. Dixon, without the government's consent (V R. 8–11, 21).[11] After ascertaining these facts (V R. 8–33), the trial court denied a defense motion that it dismiss the indictment or order pre-trial disclosure of "the entire transcript of the testimony of all witnesses submitted before the Grand Jury by the Government" (V R. 6–7, 12, 17, 22, 61–66). The court did, however, direct the government to furnish defense counsel with the grand jury testimony of Finneran, Schultise and Dixon. The court also stated that if it later developed that Finneran or his counsel had examined the testimony of any other grand jury witness it would "promptly consider broadening its ruling" (V R. 63–64).[12]

The relief granted by the district court was plainly appropriate. There is no basis whatever for peti-

[11] The volume they examined was 182 pages in length and contained the testimony of four other grand jury witnesses (V R. 24–25). None of these witnesses (including Schultise and Dixon) testified at trial.

[12] As the trial court found (V R. 63), there was no evidence to support the claim that the testimony of any other witness had been read by Finneran or his attorney.

tioner Robinson's assertion that government counsel intentionally selected and exhibited favorable portions of the grand jury testimony to reinforce the confidence of his witnesses.[13] Indeed, the witness whose memory and confidence were allegedly affected by an examination of the grand jury minutes was not called to testify for the government; he was a defense witness. Manifestly, the defense failed to carry the burden of showing a "particularized need" to see any additional grand jury testimony. See *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400; *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677, 683. Nor does this case involve a request by the defense to see the grand jury testimony of a government witness for impeachment purposes. Hence the issue presented in *Dennis* v. *United States,* No. 502, this Term, is not involved.

4. Petitioner Edlin's assertion (Pet. No. 1345, pp. 20–23) that government witnesses improperly testified to his past criminal record and earlier brushes with the law is unsound. The conflict-of-interest charges made in the indictment were based on the efforts of Congressmen Boykin and Johnson, at the behest of Edlin and Robinson, to have Department of Justice officials dismiss an indictment pending against Edlin. In the discussions between the Congressmen

[13] While the district court refused to rule specifically whether, by disclosing the minutes to Finneran, the United States Attorney had violated the secrecy requirement of Rule 6(e), Fed. R. Crim. P. (V R. 64), the court did indicate that, in its view, government counsel was not guilty of any impropriety (V R. 13–15, 18–19).

and the Department of Justice personnel, the latter explained their reasons for declining to dismiss the charges, and those representing Edlin offered explanations of his prior acts and suggested how he could aid the Department in other matters. It was in this context that evidence relating to Edlin's past history came into the record. Hence the evidence bore directly on the principal charge that Edlin used the Congressmen to serve his private ends.[14] Moreover, the trial court repeatedly admonished the jury not to consider such testimony as showing a propensity or predisposition to commit the crime for which Edlin was being tried (see, *e.g.*, V R. 40–53; VII R. 1684, 1743–1744, 1819; XIV R. 6263).

Nor was government counsel's closing argument improper. As the court of appeals observed, counsel's statement that Edlin presented no defense, no evidence and no witnesses was an accurate comment on the state of the record. It did not focus impermissibly on petitioner's failure to take the stand. See *Garcia* v. *United States*, 315 F. 2d 133, 137 (C.A. 5), certiorari denied, 375 U.S. 855; *Peeples* v. *United States*, 341 F. 2d 60, 65 (C.A. 5), certiorari denied, 380 U.S. 988.

[14] For example, evidence that defendants brought Charles Meyer, Edlin's former parole officer, from Chicago to Washington, D.C., to confer with Department officials and testimony concerning what he said at their behest about Edlin's past misconduct related directly to proof of overt acts 40–44 under the conspiracy count (see I R. 26–27).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

JUNE 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 163

J. KENNETH EDLIN, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

EUGENE GRESSMAN
1730 K Street, N.W.
Washington, D. C. 20006

EDWARD L. GENN
Colorado Building
Washington, D. C. 20005

Counsel for Petitioner

August 10, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 163

J. KENNETH EDLIN, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY BRIEF

The petitioner, J. Kenneth Edlin, files this brief in response to certain contentions advanced by the United States in its Brief in Opposition to the Petition.

A. The Constitutional Issue

In light of the Government's misunderstanding (Opp. Br. 6-8) of petitioner's claim as to the effect of the Speech or Debate Clause, it is appropriate to restate that claim. Petitioner has no quarrel with the concept of that Clause as one prohibiting only inquiries into Congressional speeches and debates and as one proscribing punishment of members of Congress out-

side the legislative chambers. Nor can there be any dispute with the idea that the purpose of the Clause is to keep legislative debate and speech free from executive or judicial limitation so as to maintain the separateness of the three branches of government. See Opp. Br. 6-7.

The question that petitioner does raise, however, and it is one to which the Government makes no answer, is whether the Speech or Debate Clause permits a violation thereof in order to convict a non-Congressional co-defendant in a conspiracy case. This Court's decision in *United States* v. *Johnson,* 383 U.S. 169, has conclusively established that the Clause was violated, in the course of prosecuting the co-defendant Congressman Johnson, by the extensive inquiry made into the content and motives of the speech he made on the floor of the House. The problem in this case is whether precisely that same inquiry into Johnson's speech and motives can be used to secure the conviction of a conspiracy co-defendant who is not a Congressman.

That problem is not one, as the Government would have it (Opp. Br. 7), of extending the constitutional privilege to private parties like the petitioner. Rather the issue is whether the privilege as to the Congressman can be violated in order to create evidence to convict a private party along with the Congressman himself. So stating the issue, it becomes obvious that the petitioner is not claiming for himself any constitutional immunity from prosecution and punishment. He is merely saying that his conviction cannot be premised upon constitutionally tainted evidence resulting from an invasion of the Congressman's immunity. And once

that invasion has been made evident, as was done in the *Johnson* decision, it matters not whether the particular defendant whose conviction rests on that invasion be a Congressman or a non-Congressman. In that event the constitutional principle proscribing judicial inquiries into the Congressman's speech and motivation demands exclusion of any and all evidence reflected by such inquiries even where the defendant is a non-Congressman. Otherwise the Speech or Debate Clause could easily be circumvented by the device of making the proscribed inquiry and using the proscribed evidence only with respect to a non-Congressional defendant. Such a subterfuge is obviously inconsistent with the high purposes and principles of the Clause in question.

The suggestion of the Government (Opp. Br. 8) that the Speech or Debate Clause protection was meant to be effective "only where the Constitution affords some remedy within the legislative branch" does not meet the problem of this case. Of course the privilege afforded by that Clause is personal to the Congressman. Of course the Clause gives that privilege on condition that the Congress retains power to "punish its Members." But a violation of that privilege is nonetheless offensive where the invasion occurs in the context of the trial of one who happens to be a non-Congressional co-defendant. And to conclude that such a co-defendant may not be convicted by resort to evidence stemming from such an invasion is not to immunize him from all punishment. Certainly the exclusion of constitutionally proscribed evidence from this defendant's trial does not immunize him from any prosecution premised on constitutionally permissible proof.

In short, let the Government proceed against petitioner for any violation of law it may validly charge. But let not the Government prove that charge by resort to evidence secured by an invasion of a Congressman's personal privilege against judicial inquiry into his speech and motivations therefor. That is the sum and substance of the important and as yet unanswered problem in this case. It is that problem that assuredly merits the attention of this Court.

Indeed, to permit the questioning of a Congressman in the course of prosecuting his wife, his aide, his constituent, or his friend is to compound the very evil that the Clause was designed to outlaw. For surely the inhibition on fearless Congressional debate is as great if not greater where the Congressman knows that his motives can be questioned in order to secure the conviction of an individual in some way associated with him.

B. The Aiding and Abetting Convictions

The response of the Government to the question whether the petitioner can be convicted of aiding and abetting the receipt of money by Congressman Johnson where Johnson's conviction as a principal has been set aside is two-fold: (1) since petitioner is "not entitled to have evidence pertaining to the speech excluded," his conviction on the substantive counts is untainted by any impermissible proof; (2) the reversal of the aiding and abetting convictions in *Shuttlesworth* v. *Birmingham*, 373 U.S. 262, is distinguishable since the conduct in that case which the defendant's allegedly aided and abetted was "an innocent act" and "not a crime at all." Opp. Br. 9. Neither proposition answers the issue posed by petitioner or detracts from the appropriateness of granting certiorari.

Indeed, the Government's claim that petitioner's convictions as aider and abettor are proper since he was not entitled to have the evidence as to the speech excluded only augments the importance and need for review of the constitutional question in this case. If petitioner is right with respect to the impact of the Speech or Debate Clause on the use of the speech evidence to secure petitioner's conviction under the conspiracy count, then the Government's claim impliedly concedes that such impermissible proof may have tainted petitioner's convictions under the substantive counts—as was held to be true with respect to Johnson. The constitutional question thus truly impregnates this whole case.

Moreover, whether the conduct to which the charge of aiding and abetting is related be deemed "an innocent act" or a crime as yet unproved would appear irrelevant in assessing the legal propriety of petitioner's convictions under the aiding and abetting counts. This is a case where the critical conduct—that of *receiving* compensation in violation of 18 U.S.C. § 281—could only have been engaged in by Johnson. Petitioner himself could not have committed that offense; hence he cannot be viewed as a principal under the aiding and abetting charges. See *United States* v. *Tornabene,* 222 F. 2d 875, 877-878 (C.A. 3). In this situation the proven guilt of the principal, Johnson, is absolutely essential to any affirmance of the aiding and abetting convictions. *Ibid.* In fact, the jury was so charged in this very case. It was instructed that "unless the Government has proved beyond a reasonable doubt that defendant Johnson received compensation as charged . . . [in counts 2 through 8] for services rendered and to be rendered before the Depart-

ment of Justice, all defendants must be acquitted on said counts." Tr. 6300.

Thus the critical element is not whether Johnson's actions were "not a crime at all" but whether his guilt *as principal* has been validly demonstrated. That element, in light of the action vacating his conviction and remanding for a new trial, is fatally absent here. "No matter how strong the evidence" may have been as to Johnson's guilt at the first trial, in the words of *United Brotherhood* v. *United States*, 330 U.S. 395, 408, there "is no way of knowing whether the jury's verdict was based on" or influenced by the constitutionally proscribed evidence. Hence Johnson's guilt as principal has yet to be properly established; and until that is done, there can be no aiding and abetting conviction. The apparent confusion of the Government respecting this basic nature of aiding and abetting convictions in federal jurisprudence underscores the need for elucidation by this Court.

C. The Prejudicial Testimony

The importance of the question concerning the cumulative impact of the prejudicial testimony concerning petitioner Edlin's character and past record has in no way been diminished by the Government. The alleged relevance of such testimony in terms of the discussions of such matters at the Department of Justice conferences (Opp. Br. 13-14) cannot overcome the *Michelson* principle, 335 U.S. 469, 475-476, closing the door on such testimony despite its asserted relevance.

Nor can the Government's claim that the trial court "repeatedly admonished the jury not to consider such testimony as showing a propensity or predisposition

to commit the crime for which Edlin was being tried" (Opp. Br. 14) serve to validate the introduction of prejudicial testimony. To begin with, the so-called "admonitions" cited by the Government were scarcely responsive, either in quantity or quality, to the countless instances of prejudicial testimony. Apart from summarily denying repeated motions for mistrial, the judge did little more than instruct the jury two or three times not to consider certain prejudicial testimony "as evidence against Mr. Edlin in this case" (Tr. 1684, 1743)—thereby leaving the prejudicial matters before the jury presumably for consideration with respect to the co-defendants. As was said in *Awkard* v. *United States,* 352 F. 2d 641, 646 (App. D.C.), such a cautionary instruction "cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another." See also *Pinkney* v. *United States,* F. 2d (App. D.C., No. 19,925, July 8, 1966); *Gregory* v. *United States,* F. 2d (App. D.C., No. 19,599, July 28, 1966). Cf. *Jackson* v. *Denno,* 378 U.S. 368, 388.

On only one occasion did the judge tell the jury that certain testimony concerning petitioner's criminal record was "not to be held against him and not to be considered by the jury . . . unless and until the Court instructs the jury otherwise," his character not being "in issue in this case." Tr. 1819. But even in that instance the prejudicial testimony was not stricken; it was held to be "relevant and material in so far as it may support one of the alleged overt acts." Tr. 1819. And there was a general remark in the final

instructions that the defendants were not on trial "for any act or conduct not charged in the indictment." Tr. 6263.

The foregoing "admonitions" are presumably the strongest or the best that the Government could find. Quite obviously, apart from their own inadequacy, they were insufficient to overcome the repeated instances where no admonition whatever was given upon the introduction of prejudicial testimony. Time and again the jury was allowed without qualification to hear remarks about petitioner's past criminal record and his reputed character. Illustrative of the prejudicial atmosphere which surrounded petitioner's trial was the court's own questioning of a witness to develop the facts concerning petitioner's plea and sentence in a prior criminal proceeding (Tr. 1219-1220) and the freedom accorded other questions concerning petitioner's unrelated indictment then pending in Montgomery County, Md. (Tr. 1529-1530). It was the accumulation of such prejudicial testimony that made the trial so unfair.

Even if the sparse admonitions be considered prompt or sufficient on their face, the caveat of *Pierce* v. *United States*, 56 F. 2d 949, 952-953 (C.A. 5), remains relevant:

> "To those with any breadth of experience in the trial of criminal cases it must be clear that suggestions, especially when often repeated, that a defendant has earlier been in trouble with the law, that he has elsewhere or previously been indicted, (and like matters) are so prejudicial that no admonitions from the court that they be disregarded, however promptly and forcibly made, may be safely relied upon to free the minds of the jurors from the impression that the defendant is of bad

character and capable of committing the crime charged. They may completely overthrow the presumption of innocence . . . ."

As was said by Mr. Justice Jackson, concurring in *Krulewitch* v. *United States,* 336 U.S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

That observation has great force in this case, where the repetition and totality of the prejudicial testimony were so great. Prejudice accumulated is atmosphere infected. And a conviction obtained in such an atmosphere cannot stand. See *United States* v. *Tomaiolo,* 249 F. 2d 683, 689-697 (C.A. 2).

Preservation of the fair administration of federal criminal justice necessitates thorough review by this Court of the prejudicial atmosphere surrounding petitioner's trial.

CONCLUSIOIN

For these reasons, supplementing those in the Petition, certiorari should issue to review the decision and judgment below respecting this petitioner.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N.W.
Washington, D. C. 20006

EDWARD L. GENN
Colorado Building
Washington, D. C. 20005

Counsel for Petitioner

August 10, 1966